This is a digital copy of a book that was preserved for generations on library shelves before it was carefully scanned by Google as part of a project to make the world's books discoverable online.

It has survived long enough for the copyright to expire and the book to enter the public domain. A public domain book is one that was never subject to copyright or whose legal copyright term has expired. Whether a book is in the public domain may vary country to country. Public domain books are our gateways to the past, representing a wealth of history, culture and knowledge that's often difficult to discover.

Marks, notations and other marginalia present in the original volume will appear in this file - a reminder of this book's long journey from the publisher to a library and finally to you.

Usage guidelines

Google is proud to partner with libraries to digitize public domain materials and make them widely accessible. Public domain books belong to the public and we are merely their custodians. Nevertheless, this work is expensive, so in order to keep providing this resource, we have taken steps to prevent abuse by commercial parties, including placing technical restrictions on automated querying.

We also ask that you:

+ *Make non-commercial use of the files* We designed Google Book Search for use by individuals, and we request that you use these files for personal, non-commercial purposes.

+ *Refrain from automated querying* Do not send automated queries of any sort to Google's system: If you are conducting research on machine translation, optical character recognition or other areas where access to a large amount of text is helpful, please contact us. We encourage the use of public domain materials for these purposes and may be able to help.

+ *Maintain attribution* The Google "watermark" you see on each file is essential for informing people about this project and helping them find additional materials through Google Book Search. Please do not remove it.

+ *Keep it legal* Whatever your use, remember that you are responsible for ensuring that what you are doing is legal. Do not assume that just because we believe a book is in the public domain for users in the United States, that the work is also in the public domain for users in other countries. Whether a book is still in copyright varies from country to country, and we can't offer guidance on whether any specific use of any specific book is allowed. Please do not assume that a book's appearance in Google Book Search means it can be used in any manner anywhere in the world. Copyright infringement liability can be quite severe.

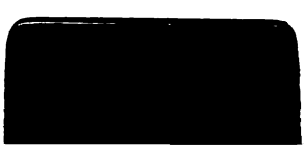
About Google Book Search

Google's mission is to organize the world's information and to make it universally accessible and useful. Google Book Search helps readers discover the world's books while helping authors and publishers reach new audiences. You can search through the full text of this book on the web at `http://books.google.com/`

3 2044 078 579 331

HARVARD LAW LIBRARY

Received MAY 18 1917



Digitized by Google

Digitized by Google

Digitized by Google

Digitized by Google

Digitized by Google

Digitized by Google

Digitized by Google

MICHIGAN REPORTS

CASES DECIDED

IN THE

SUPREME COURT

OF

MICHIGAN

FROM

SEPTEMBER 28 TO DECEMBER 21, 1915

JAMES M. REASONER
STATE REPORTER

VOL. 188

FIRST EDITION

CHICAGO
CALLAGHAN AND COMPANY
1916

Digitized by Google

Copyright, 1916, by Coleman C. Vaughan, Secretary of State for the State of Michigan.

MAY 18 1917

Digitized by Google

SUPREME COURT.

CHIEF JUSTICE.

	TERM EXPIRES
FLAVIUS L. BROOKE, Detroit, . . .	Dec. 31, 1915

ASSOCIATE JUSTICES.

ROLLIN H. PERSON,[1] Lansing.	
FRANZ C. KUHN, Mt. Clemens, . . .	Dec. 31, 1917
JOHN W. STONE, Marquette, ...	Dec. 31, 1917
RUSSELL C. OSTRANDER, Lansing, . .	Dec. 31, 1919
JOHN E. BIRD, Adrian, ...	Dec. 31, 1919
JOSEPH B. MOORE, Lapeer, ...	Dec. 31, 1921
JOSEPH H. STEERE, Sault Ste. Marie, . .	Dec. 31, 1921

Clerk—CHARLES C. HOPKINS, Lansing.

Crier—ANDREW B. CHAPIN, Lansing.

Attorney General—GRANT FELLOWS, Hudson.

The residences of the judges, given above, are as of the date of their election.

[1]Appointed July 16, 1915, to fill vacancy.

Digitized by Google

CIRCUIT JUDGES.

1.	GUY M. CHESTER,	HILLSDALE.
2.	GEORGE W. BRIDGMAN,	BENTON HARBOR.
3.	ALFRED J. MURPHY, GEORGE S. HOSMER, HENRY A. MANDELL, P. J. M. HALLY, GEORGE P. CODD, PHILIP T. VAN ZILE,	DETROIT.
4.	JAMES A. PARKINSON,	JACKSON.
5.	CLEMENT SMITH,	HASTINGS.
6.	GEORGE W. SMITH,	PONTIAC.
7.	MARK W. STEVENS,	FLINT.
8.	FRANK D. M. DAVIS,	IONIA.
9.	GEORGE V. WEIMER,	KALAMAZOO.
10.	WILLIAM G. GAGE, WILLIAM R. KENDRICK,	SAGINAW.
11.	LOUIS H. FEAD,	NEWBERRY.
12.	PATRICK H. O'BRIEN,	HOUGHTON.
13.	FREDERICK W. MAYNE,	CHARLEVOIX.
14.	JAMES E. SULLIVAN,	MUSKEGON.
15.	FREDERICK W. KNOWLEN,	CONSTANTINE.
16.	JAMES G. TUCKER,	MT. CLEMENS.
17.	WILLIS B. PERKINS, JOHN S. McDONALD, WILLIAM B. BROWN,	GRAND RAPIDS.
18.	CHESTER L. COLLINS,	BAY CITY.
19.	CHARLES A. WITHEY,	REED CITY.
20.	ORIEN S. CROSS,	ALLEGAN.
21.	PETER F. DODDS,	MT. PLEASANT.
22.	EDWARD D. KINNE,	ANN ARBOR.
23.	ALBERT WIDDIS,	TAWAS CITY.
24.	WATSON BEACH,	LEXINGTON.
25.	RICHARD C. FLANNIGAN,	NORWAY.
26.	FRANK EMERICK,	ALPENA.
27.	JOSEPH BARTON,	BIG RAPIDS.
28.	FRED S. LAMB,	CADILLAC.
29.	KELLEY S. SEARL,	ITHACA.

Digitized by Google

30.	HOWARD WIEST,	LANSING.
	CHARLES B. COLLINGWOOD,	EAST LANSING.
31.	EUGENE F. LAW,	PORT HURON.
	HARVEY TAPPAN,	
32.	SAMUEL S. COOPER,	IRONWOOD.
33.	FRANK SHEPHERD,	CHEBOYGAN.
34.	NELSON SHARPE,	WEST BRANCH.
35.	SELDEN S. MINER,	OWOSSO.
36.	L. BURGET DES VOIGNES,	CASSOPOLIS.
37.	WALTER H. NORTH,	BATTLE CREEK.
38.	EDWARD R. GILDAY,	MONROE.
39.	BURTON L. HART,	ADRIAN.

MUNICIPAL JUDGES.

RECORDER'S COURT OF DETROIT,

WILLIAM F. CONNOLLY, EDWARD J. JEFFRIES.

SUPERIOR COURT OF GRAND RAPIDS, PETER J. DANHOF.

Digitized by Google

JUDICIAL CIRCUITS.

Counties.	Circuits.
Alcona	23
Alger	11
Allegan	20
Alpena	26
Antrim	13
Arenac	34
Baraga	12
Barry	5
Bay	18
Benzie	28
Berrien	2
Branch	15
Calhoun	37
Cass	36
Charlevoix	13
Cheboygan	33
Chippewa	11
Clare	21
Clinton	29
Crawford	34
Delta	25
Dickinson	25
Eaton	5
Emmet	33
Genesee	7
Gladwin	34
Gogebic	32
Grand Traverse	13
Gratiot	29
Hillsdale	1
Houghton	12
Huron	24
Ingham	30
Ionia	8
Iosco	23
Iron	25
Isabella	21
Jackson	4
Kalamazoo	9
Kalkaska	28
Kent	17
Keweenaw	12
Lake	19
Lapeer	6
Leelanau	13
Lenawee	39
Livingston	35
Luce	11
Mackinac	33
Macomb	16
Manistee	19
Marquette	25
Mason	19
Mecosta	27
Menominee	25
Midland	21
Missaukee	28
Monroe	38
Montcalm	8
Montmorency	26
Muskegon	14
Newaygo	27
Oakland	6
Oceana	14
Ogemaw	34
Ontonagon	32
Osceola	19
Oscoda	23
Otsego	34
Ottawa	20
Presque Isle	29
Roscommon	34
Saginaw	10
St. Clair	31
St. Joseph	15
Sanilac	24
Schoolcraft	11
Shiawassee	35
Tuscola	24
Van Buren	36
Washtenaw	22
Wayne	3
Wexford	28

Digitized by Google

TABLE OF CASES REPORTED.

	PAGE
Acorn Refining Co. *v.* Knowlson	123
Ætna Insurance Co., First National Bank of Sault Ste. Marie *v.*	251
Aho *v.* Cleveland Cliffs Iron Co	218
Akers *v.* Mead	277
Albert *v.* Patterson	378
Allen *v.* Allen	532
Atwood, People *v.*	36
Austin *v.* Knell	100
Baker *v.* Kamantowsky	569
Baldwin *v.* Village of Chesaning	17
Barger *v.* Bissell	366
Barnhart *v.* Pere Marquette Railroad Co	537
Barrett, Hynes *v.*	154
Bauman, Stroh *v.*	579
Belton, Taylor *v.*	302
Bernard *v.* Michigan United Traction Co	504
Bissell, Barger *v.*	366
Black, Wilk *v.*	478
Board of Commissioners of the Poor of the City of Detroit, Pryzbylowski *v.*	270
Bogart, Case *v.*	297
Bonine, Kimmerle *v.*	148
Bottomley *v.* Brown	134
Bradshaw, Mortensen *v.*	436
Bretz *v.* Hitchcock	492
Brin *v.* Michalski	400

Digitized by Google

PAGE
Brooks, Parks *v*..... 645
Brown, Bottomley *v*..... 134
———, Parsille *v*..... 485
Buckley, School of Applied Art *v*..... 178
Burns *v*. Estate of Reading..... 591

Caledonian Insurance Co., First National Bank of Sault Ste. Marie *v*..... 254
Calumet & Hecla Mining Co., Vrelenich *v*..... 407
Case *v*. Bogart..... 297
Casterton *v*. Plotkin..... 333
Chesaning, Baldwin *v*..... 17
Churchill *v*. Grand Trunk Western Railway Co.. 376
City of Detroit, Wood *v*..... 547
City of North Muskegon *v*. Rodgers..... 93
City of Sault Ste. Marie, Purdy *v*..... 573
Cleveland Cliffs Iron Co., Aho *v*..... 218
———, Hannula *v*..... 543
———, Kangas *v*..... 255
Concordia Mutual Fire Insurance Co. of Bay, Saginaw & Arenac Counties, Lagden *v*.....689, 699
Connors, Gogarn *v*..... 161
Cornell *v*. Norton..... 187
Coyne, Lavigne *v*..... 382

Darrow *v*. Minneapolis, St. Paul & Sault Ste. Marie Railway Co.....664, 669
Davison, Rogers *v*..... 519
Day, First State Bank of Decatur *v*..... 228
Dennis Lumber Co., Stearns Salt & Lumber Co. *v*. 700
Detroit, Wood *v*..... 547
Detroit & Mackinac Railway Co., Moss *v*..... 1
Detroit Board of Commissioners of the Poor, Pryzbylowski *v*..... 270
Detroit, Grand Haven & Milwaukee Railway Co., Hoover *v*..... 313
Detroit Stove Works, Guido *v*..... 359

Digitized by Google

PAGE
Detroit United Railway, Pearl *v*..... 84
Dixon, People *v*..... 307
Donaldson, Zacharias *v*..... 443
Dyer *v*. People's Ice Co..... 203

Elm Cooperage Co., Johnston *v*..... 117
English *v*. Michigan Central Railroad Co..... 286
Estate of Reading, Burns *v*..... 591

First National Bank of Sault Ste. Marie *v*. Ætna Insurance Co..... 251
——— *v*. Caledonian Insurance Co..... 254
First State Bank of Decatur *v*. Day..... 228
———, O'Dell *v*..... 228
Ford, Rogers *v*..... 62
Fuller, Weissert *v*..... 327

Gage, People *v*..... 635
Gilchrist *v*. Mystic Workers of the World..... 466
Gillerman's Estate, Greenman *v*..... 74
Gogarn *v*. Connors..... 161
Grand Rapids & Indiana Railway Co. *v*. Michigan Railroad Commission..... 108
Grand Trunk Western Railway Co., Churchill *v*.. 376
Greenman *v*. Gillerman's Estate..... 74
Guido *v*. Detroit Stove Works..... 359

Haener *v*. McKenzie..... 27
Haight, Smith *v*..... 512
Halpin, Pike *v*..... 447
Hamilton, *In re*..... 499
Hannula *v*. Cleveland Cliffs Iron Co..... 543
Hendershott *v*. Moore..... 364
Hibbler, La Tour *v*..... 140
Hicks, Salmer *v*..... 391
Hitchcock, Bretz *v*..... 492
Hodges, Parent *v*..... 69

Digitized by Google

PAGE

Holmberg *v.* Lake Shore & Michigan Southern Railway Co. 605
Hoover *v.* Detroit, Grand Haven & Milwaukee Railway Co. 313
Houghton (H.) & Sons, People *for use of*, *v.* Traves 345
Hynes *v.* Barrett..... 154

In re Hamilton..... 499
——— Thayer's Estate..... 261
International Harvester Co. of America, Mishler *v.* 104

Jackson Circuit Judge, Mesler *v.*..... 195
Jankovich *v.* Wayne Circuit Judge..... 284
Jerome, Wolverine Land Co. *v.*..... 66
John S. Noel Co. *v.* Newcomb..... 53
Johnston *v.* Elm Cooperage Co..... 117

Kamantowsky, Baker *v.*..... 569
Kangas *v.* Cleveland Cliffs Iron Co..... 255
Kimmerle *v.* Bonine..... 148
Knell, Austin *v.*..... 100
Knowlson, Acorn Refining Co. *v.*..... 123

Lafayette Benevolent Society *v.* Richardson..... 57
Lagden *v.* Concordia Mutual Fire Insurance Co. of Bay, Saginaw & Arenac Counties.....689, 699
Lake Shore & Michigan Southern Railway Co., Holmberg *v.* 605
La Tour *v.* Hibbler..... 140
Lavigne *v.* Coyne..... 382
Lawson, Williams *v.*..... 88
Loud *v.* Solomon..... 7

McKenzie, Haener *v.*..... 27
McRae *v.* Sleeper..... 168

Digitized by Google

PAGE
Mead, Akers *v*..... 277
Mesler *v.* Jackson Circuit Judge..... 195
Michalski, Brin *v*..... 400
Michigan Central Railroad Co., English *v*..... 286
———, Risbridger *v*.....672, 679
Michigan Railroad Commission, Grand Rapids & Indiana Railway Co. *v*..... 108
Michigan United Traction Co., Bernard *v*..... 504
Minneapolis, St. Paul & Sault Ste. Marie Railway Co., Darrow *v*.....664, 669
Mishawaka Woolen Manufacturing Co. *v.* Stanton 237
Mishler *v.* International Harvester Co. of America 104
Moore, Hendershott *v*..... 364
Morgan *v.* Zanger..... 212
Mortensen *v.* Bradshaw..... 436
Moss *v.* Detroit & Mackinac Railway Co..... 1
Mystic Workers of the World, Gilchrist *v*..... 466

Newcomb, John S. Noel Co. *v*..... 53
New Jersey Terra Cotta Co., People, *for use of*, *v.* Traves 415
Noel Co. (John S.) *v.* Newcomb..... 53
North Muskegon *v.* Rodgers..... 93
Norton, Cornell *v*..... 187
Nowland's Estate, Vandecar *v*..... 429

Oakfield Township Board, Price *v*..... 524
O'Dell *v.* First State Bank of Decatur..... 228

Parent *v.* Hodges..... 69
Parks *v.* Brooks..... 645
Parsille *v.* Brown..... 485
Patterson, Albert *v*..... 378
Pearl *v.* Detroit United Railway..... 84
People *v.* Atwood..... 36

Digitized by Google

PAGE
People *v.* Dixon 307
——— *v.* Gage 635
———, *for use of* H. Houghton & Sons, *v.* Traves. 345
———, *for use of* New Jersey Terra Cotta Co., *v.* Traves 415
People's Ice Co., Dyer *v.* 203
Pere Marquette Railroad Co., Barnhart *v.* 537
Pike *v.* Halpin 447
Plotkin, Casterton *v.* 333
Price *v.* Township Board of Oakfield Township.. 524
Pryzbylowski *v.* Board of Commissioners of the Poor of the City of Detroit 270
Purdy *v.* City of Sault Ste. Marie 573

Reading's Estate, Burns *v.* 591
Richardson, Lafayette Benevolent Society *v.* 57
Risbridger *v.* Michigan Central Railroad Co..672, 679
Robbins *v.* Trebilcock 163
Rockford Malleable Iron Works *v.* Tilden 80
Rodgers, City of North Muskegon *v.* 93
Rogers *v.* Davison 519
——— *v.* Ford 62

Salmer *v.* Hicks 391
Sault Ste. Marie, Purdy *v.* 573
Schook *v.* Zimmerman 617
School of Applied Art *v.* Buckley 178
Sleeper, McRae *v.* 168
Smith *v.* Haight 512
Solomon *v.* Weiner 114
———, Loud *v.* 7
Stanton, Mishawaka Woolen Manufacturing Co. *v.* 237
Stearns Salt & Lumber Co. *v.* Dennis Lumber Co. 700
Stroh *v.* Bauman 579

Taylor *v.* Belton 302

Digitized by Google

PAGE

Thayer *v.* Thayer..... 261
Thayer's Estate, *In re*..... 261
Tilden, Rockford Malleable Iron Works *v*..... 80
Township Board of Oakfield Township, Price *v*.. 524
Traves, People, *for use of* H. Houghton & Sons, *v*. 345
Traves, People, *for use of* New Jersey Terra Cotta Co., *v*. 415
Trebilcock, Robbins *v*..... 163
Tyler *v*. Wright.....561, 567

Union Trust Co., Weir *v*..... 452

Vandecar *v*. Nowland's Estate..... 429
Village of Chesaning, Baldwin *v*..... 17
Vrelenich *v*. Calumet & Hecla Mining Co..... 407

Wayne Circuit Judge, Jankovich *v*..... 284
Weiner, Solomon *v*..... 114
Weir *v*. Union Trust Co..... 452
Weissert *v*. Fuller..... 327
Wilk *v*. Black..... 478
Williams *v*. Lawson..... 88
Wolverine Land Co. *v*. Jerome..... 66
Wood *v*. City of Detroit..... 547
Wright, Tyler *v*.....561, 567

Zacharias *v*. Donaldson..... 443
Zanger, Morgan *v*..... 212
Zimmerman, Schook *v*..... 617

96 CASES.

Digitized by Google

TABLE OF CASES CITED.

PAGE

Ablard *v.* Railway, 139 Mich. 248.....87, 88
Adams *v.* Iron Cliffs Co., 78 Mich. 271..... 258
Aerkfetz *v.* Humphreys, 145 U. S. 418..... 539
Alabama, etc., R. Co. *v.* Jones, 73 Miss. 110..... 604
Allen *v.* City of Detroit, 167 Mich. 464.....89, 343
——— *v.* Talbot, 170 Mich. 664..... 34
Allis *v.* Voigt, 90 Mich. 125..... 127
Allison *v.* Chandler, 11 Mich. 542..... 6
Alpern *v.* Churchill, 53 Mich. 607..... 211
Amanta *v.* Railroad Co., 177 Mich. 280..... 542
American Brewing Co. *v.* City of St. Louis, 187 Mo. 367..25, 26
American Harrow Co. *v.* Deyo, 134 Mich. 639.....245, 248
Amoe *v.* Engineering Works, 151 Mich. 212..... 227
A. M. Todd Co. *v.* Insurance Co., 137 Mich. 188..... 693
Anderson Transfer Co. *v.* Fuller, 174 Ill. 221..... 12
Andrews *v.* City of South Haven, 187 Mich. 294..... 556
——— *v.* Mining Co., 180 Mich. 72.....227, 260, 413
Andries *v.* Railway Co., 105 Mich. 557..... 332
Angell *v.* Loomis, 97 Mich. 5..... 35
Appenzeller *v.* Appenzeller, 177 Mich. 303..... 461
Atchison, etc., R. Co. *v.* Wilkie, 77 Kan. 791..... 542
Atkin *v.* Kansas, 191 U. S. 207..... 554
Atkinson *v.* Japink, 186 Mich. 335..... 248
Attorney General *v.* Bolger, 128 Mich. 355..... 274
——— *v.* Lothrop, 24 Mich. 235..... 274
Austrian & Co. *v.* Springer, 94 Mich. 343..... 127
Avikainen *v.* Mining Co., 160 Mich. 375..... 227

Backus *v.* Cowley, 162 Mich. 585..... 496
Bagnall *v.* Young, 151 Mich. 69..... 89
Balch *v.* Railroad Co., 78 Mich. 654..... 564
Barnes *v.* Barnes, 95 Cal. 171..... 535
Barnowsky *v.* Helson, 89 Mich. 523..... 211
Barnum (E. T.) Wire, etc., Works *v.* Circuit Judge, 59 Mich. 272 536
Bates *v.* Circuit Judge, 82 Mich. 91..... 536
Battishill *v.* Humphreys, 64 Mich. 494..... 321
Beach *v.* Railroad Co., 180 Mich. 524..... 363
Becker *v.* Railway Co., 121 Mich. 580..... 542
Bedford *v.* Penny, 58 Mich. 424..... 172
Beesley *v.* F. W. Wheeler & Co., 103 Mich. 196..... 259
Benham *v.* Insurance Co., 165 Mich. 406.....693, 695

Digitized by Google

PAGE
Bennett *v.* Circuit Judge, 181 Mich. 700..... 201
Bergstrom *v.* Staples, 82 Mich. 654..... 486
Berkey *v.* Burchard, 119 Mich. 101..... 99
Bertha *v.* Motor Car Co., 180 Mich. 51..... 602
Betts *v.* Village of Reading, 93 Mich. 77.....20, 23, 25
Beuthien *v.* Dillon, 160 Mich. 396.....667, 671
Blades *v.* Board of Water Commissioners, 122 Mich. 366.... 274
Blakeslee *v.* Peabody, 180 Mich. 408..... 217
Blondin *v.* Griffin, 133 Mich. 647..... 99
Bloss *v.* Board of Supervisors of Jackson County, 170 Mich. 607 97
Blumberg *v.* Beekman, 121 Mich. 647..... 162
Board of Park Commissioners *v.* Common Council, 28 Mich. 228 .....274, 553
Bolio *v.* Marvin, 130 Mich. 82..... 523
Bonnott Co. *v.* Newman Bros., 108 Iowa, 158..... 250
Bourget *v.* Monroe, 58 Mich. 563..... 630
Boyer *v.* Insurance Co., 124 Mich. 455..... 692
Bresler *v.* Pitts, 58 Mich. 347..... 332
Brown *v.* Brown, 135 Mich. 141..... 202
——— *v.* Harris, 139 Mich. 372 117
——— *v.* Marshall, 47 Mich. 576..... 482
——— *v.* State, 72 Md. 468..... 12
Bucklew *v.* Railway Co., 64 Iowa, 603..... 552
Bunday *v.* Machine Co., 143 Mich. 10.....245, 248
Burns *v.* Ford, 124 Mich. 274..... 9
Burtram *v.* Railroad Co., 148 Mich. 166..... 320

Camovito *v.* Matthews, 82 N. J. Eq. 218..... 344
Campau *v.* Lafferty, 50 Mich. 114..... 250
Campbell *v.* Cook, 86 Tex. 630..... 552
——— *v.* Holt, 115 U. S. 620..... 449
———, *In re*, 138 Mich. 597..... 503
Canfield *v.* City of Jackson, 112 Mich. 120..... 319
Caniff *v.* Navigation Co., 66 Mich. 638..... 258
Canton Lumber Co. *v.* Liller, 107 Md. 146..... 704
Carlson *v.* Railroad Co., 120 Mich. 481..... 539
Carmer *v.* Hubbard, 123 Mich. 333..... 306
Carterville Coal Co. *v.* Abbott, 181 Ill. 495..... 552
Cashin *v.* Pliter, 168 Mich. 386.....115, 139
Central Vermont R. Co. *v.* White, 238 U. S. 508..... 614
Chamberlain *v.* Wallace, 176 Mich. 609..... 60
Chauvin *v.* Railway, 135 Mich. 85.....87, 88
Chicago, etc., R. Co. *v.* Moranda, 93 Ill. 302..... 258
——— *v.* Still, 19 Ill. 499..... 541
Chiodo *v.* Williams, 180 Mich. 367.....667, 671
Choate *v.* Stevens, 116 Mich. 28.....248, 249
Civil Service Commission *v.* Engel, 187 Mich. 83.....273, 276
Clark *v.* Railroad Co., 113 Mich. 24..... 683
Cleveland Iron Mining Co. *v.* Husby, 72 Mich. 61..... 61
Clothier *v.* Miller, 173 Mich. 530..... 497
Cluverius *v.* Commonwealth, 81 Va. 787..... 49
Coeling *v.* Green, 163 Mich. 27..... 248

Digitized by Google

PAGE
Coessens *v.* Rapid Railway, 136 Mich. 481..... 326
Cogdell *v.* Railway Co., 129 N. C. 398..... 552
Colburn's Estate, *In re*, 153 Mich. 206..... 75
Coley *v.* Railroad Co., 129 N. C. 407..... 552
Columbus & Hocking Coal, etc., Co. *v.* See, 169 Mich. 661..703, 704
Commonwealth *v.* Trefethen, 157 Mass. 180..... 49
Conell *v.* Hall, 22 Mich. 377..... 162
Connell *v.* McNett, 109 Mich. 329..... 396
Cook *v.* Knowles, 38 Mich. 316..... 450
Coon *v.* Coon, 163 Mich. 644..... 535
Copas *v.* Provision Co., 73 Mich. 541..... 572
Coudert *v.* Sayre, 46 N. J. Eq. 386..... 341
Courtright *v.* Courtright, 40 Mich. 623..... 79
Cousins *v.* Railway Co., 96 Mich. 386..... 564
Crane *v.* Indemnity Co., 43 Wash. 516..... 428
Cressler *v.* Paper Co., 181 Mich. 422..... 363
Cummings *v.* Railway, 163 Mich. 304..... 82
Cummins, *In re*, 138 Mich. 39..... 503

Daly *v.* Railway Co., 105 Mich. 193..... 539
Danula *v.* Mining Co., 166 Mich. 350..... 413
Davidson *v.* Hine, 151 Mich. 294..... 274
Davis *v.* Board of Supervisors, 89 Mich. 295..... 274
Davis (D. H.) Coal Co. *v.* Polland, 27 Ind. App. 697..... 552
Davis-Smith Co., State, *ex rel.*, *v.* Clausen, 65 Wash. 156... 550
Davock *v.* Moore, 105 Mich. 120..... 273
Decker *v.* Kanous' Estate, 129 Mich. 146..... 75
De Gray *v.* Club House Co., 50 N. J. Eq. 329..... 92
Demill *v.* Moffat, 45 Mich. 410..... 486
Deppe *v.* Railroad Co., 36 Iowa, 52..... 552
Detroit, etc., R. Co. *v.* Railroad Com'n, 171 Mich. 335..... 112
Detroit River Transit Co. *v.* Aldrich, 176 Mich. 357..... 351
Detroit Shipbuilding Co. *v.* Comstock, 144 Mich. 516..... 108
Dewes (F. J.) Brewery Co. *v.* Merritt, 82 Mich. 198..... 245
D. H. Davis Coal Co. *v.* Polland, 27 Ind. App. 697..... 552
Ditberner *v.* Railway Co., 47 Wis. 138..... 552
Dolan *v.* Smith, 147 Mich. 276..... 332
Dombrowski *v.* Manufacturing Co., 180 Mich. 202..... 363
Donnelly *v.* Lyons, 173 Mich. 515..... 461
Donovan *v.* Driscoll, 116 Iowa, 339..... 436
Downer *v.* Chesebrough, 36 Conn. 39..... 82
Druck *v.* Lime Co., 167 Mich. 154..... 167
Druse *v.* Wheeler, 22 Mich. 439..... 406
Ducey Lumber Co. *v.* Lane, 58 Mich. 520..... 518
Duffy *v.* Charters, 180 Mich. 572..... 482
Duncan Land, etc., Co. *v.* Rusch, 145 Mich. 1..... 521
Dwight *v.* Cutler, 3 Mich. 566..... 517

Easterbrook *v.* Society, 85 Conn. 289..... 89
Edwards *v.* McClelland, 118 N. Y. Supp. 181..... 310
——— *v.* Symons, 65 Mich. 348..... 245
Eesley Light, etc., Co. *v.* Power Co., 172 Mich. 78..... 209
Elliott *v.* Van Buren, 33 Mich. 49..... 566
Emerson *v.* Atwater, 7 Mich. 12..... 162

Digitized by Google

PAGE
Employers' Liability Cases, 207 U. S. 463..... 551
English *v.* Railroad Co., 188 Mich. 286..... 541
Eslow *v.* City of Albion, 153 Mich. 720..... 20
E. T. Barnum Wire, etc., Works *v.* Circuit Judge, 59 Mich. 272 536
Eureka Iron, etc., Works *v.* Bresnahan, 66 Mich. 489..... 172
Evans *v.* Russell, 180 Mich. 534..... 217
Excelsior Foundry Co. *v.* Assurance Co., 135 Mich. 467.... 696
Excelsior Iron Works *v.* Lee, 123 Mich. 499..... 243

Farrell *v.* Haze, 157 Mich. 374..... 482
Finn *v.* Adams, 138 Mich. 258.....61, 79
First National Bank *v.* Insurance Co., 188 Mich. 251..... 255
Fitschen *v.* Olson, 155 Mich. 320..... 667
F. J. Dewes Brewery Co. *v.* Merritt, 82 Mich. 198..... 245
Fortesque *v.* Carroll, 76 N. J. Eq. 583..... 344
Fowler *v.* Town of Strawberry Hill, 74 Iowa, 644..... 12
Freud *v.* Circuit Judge, 131 Mich. 606..... 201
Frink *v.* Hughes, 133 Mich. 63..... 89

Gallagher *v.* Himelberger, 57 Ind. 63..... 518
Galvin *v.* O'Brien, 96 Mich. 483..... 36
Gault *v.* Stormont, 51 Mich. 636..... 406
Georgia *v.* Bond, 114 Mich. 196..... 82
Georgia Railroad *v.* Ivey, 73 Ga. 499..... 552
Gibson *v.* Railroad Co., 164 Pa. 142..... 603
Ginn *v.* Coal Co., 143 Mich. 84..... 207
Grady *v.* Railroad & Banking Co., 112 Ga. 668..... 688
Grand Rapids Electric Co. *v.* Manfg. Co., 142 Mich. 4....127, 130
Gray *v.* Barton, 62 Mich. 186..... 60
Green *v.* Railway Co., 110 Mich. 648..... 323
Griffin *v.* Kennedy, 148 Mich. 583.....499, 667, 668, 670, 671
Grobbel *v.* Board of Water Commissioners, 181 Mich. 364.. 273
Guarantee Co. *v.* Brick Co., 191 U. S. 416..... 358
Gumberg *v.* Truesch, 110 Mich. 451..... 176
Gunn *v.* Barry, 15 Wall. 610..... 449

Hackley *v.* Headley, 45 Mich. 569..... 20
Haden *v.* Closser, 153 Mich. 182..... 521
Hagerman *v.* Wigent, 108 Mich. 192..... 268
Haight *v.* Smith, 178 Mich. 392.....514-516
Hailey *v.* Railway Co., 113 La. 533..... 552
Haines *v.* Hayden, 95 Mich. 332..... 268
——— *v.* Railway Co., 129 Mich. 475..... 542
Hall *v.* Car Co., 168 Mich. 634..... 34
——— *v.* Mill Co., 39 Wash. 447..... 552
Hanley *v.* Balch, 106 Mich. 46..... 486
Hanold *v.* Common Council of Stambaugh, 163 Mich. 243.. 531
Hargreaves *v.* Deacon, 25 Mich. 1..... 322
Harrington *v.* Dickinson, 155 Mich. 161..... 99
Harris *v.* Harris, 106 Mich. 246..... 75
——— *v.* Roraback, 137 Mich. 292..... 89
——— *v.* State, 96 Ala. 24..... 49
Hawes *v.* Insurance Co., 109 Mich. 324..... 235

Digitized by Google

PAGE

Hempfling *v.* Burr, 59 Mich. 294 185
Henderson *v.* City of Detroit, 61 Mich. 378 517
Hitchcock *v.* Burgett, 38 Mich. 501 482
——— *v.* Circuit Judge, 97 Mich. 614 201
Hoar *v.* Merritt, 62 Mich. 386 258
Hodges *v.* Buell, 134 Mich. 162 194
Hoffman *v.* Loud, 111 Mich. 156 566
Hogsett *v.* Ellis, 17 Mich. 351 517
Holden *v.* Insurance Co., 165 N. Y. 13 476
Holmes *v.* Gregg, 66 N. H. 621 705
——— *v.* Loud, 149 Mich. 410 442
Home Life Ins. Co. *v.* Elwell, 111 Mich. 689 82
Hood *v.* Olin, 68 Mich. 165 245
Hoover *v.* Peters, 18 Mich. 51 572
Hough *v.* Dickinson, 58 Mich. 89 172
Houghton *v.* Ross, 54 Mich. 335 250
Howey *v.* Fisher, 111 Mich. 422 486
Hubbard *v.* Miller, 27 Mich. 15 ..... 137, 138
——— *v.* Township Board of Springwells, 25 Mich. 153 274
Hudson *v.* Judge of Superior Court, 42 Mich. 248 535
Huggins *v.* Sutherland, 39 Wash. 552 428
Huggett *v.* Erb, 182 Mich. 524 ..... 321, 323
Hughes *v.* City of Detroit, 161 Mich. 283 442
Hunter *v.* State, 40 N. J. Law, 495 49
Huron Land Co. *v.* Manufacturing Co., 183 Mich. 45 499
Hutchins *v.* Kimmell, 31 Mich. 126 669
Hyatt *v.* Adams, 16 Mich. 180 482

Ingersoll *v.* Kirby, Walk. Ch. 27 236
Inglish *v.* Ayer, 79 Mich. 516 127
In re Campbell, 138 Mich. 597 503
——— Coburn's Estate, 153 Mich. 206 75
——— Cummins, 138 Mich. 39 503
——— Lambrecht, 137 Mich. 450 530
——— Mansbach's Estate, 150 Mich. 348 268
——— Richards, 150 Mich. 421 502
Interstate Commerce Com'n *v.* Railroad Co., 227 U. S. 88 112
——— *v.* ———, 216 U. S. 538 ..... 112, 113
Island Coal Co. *v.* Swaggerty, 159 Ind. 664 552
Island Mill Lumber Co. *v.* City of Alpena, 176 Mich. 575 461
Ives *v.* Railway Co., 201 N. Y. 271 ..... 550, 551

Jackson *v.* Mason, 143 Mich. 355 521
James *v.* Irvine, 141 Mich. 376 ..... 89, 92, 337
J. B. Millet Co. *v.* Andrews, 175 Mich. 350 107
Jenkinson *v.* Auditor General, 104 Mich. 34 99
Jenks *v.* Pawlowski, 98 Mich. 110 89
Jensen *v.* Southern Pacific Co., 215 N. Y. 514 550
John *v.* McNeal, 167 Mich. 148 194
John Deere Plow Co. *v.* Mowry, 222 Fed. 1 ..... 244, 249
Johnson *v.* Coal Co., 88 Ark. 243 552
——— *v.* Jackson, 168 Mich. 149 122
——— *v.* Railway Co., 135 Mich. 353 442
——— *v.* Southern Pacific Co., 196 U. S. 1 552
——— *v.* Van Velsor, 43 Mich. 208 235

Digitized by Google

PAGE
Jones *v.* Railway Co., 168 Mich. 1..... 615
Jordan *v.* Stevens, 51 Me. 78..... 662
——— *v.* White, 38 Mich. 253..... 172
Judd *v.* Judd, 125 Mich. 228..... 202
Julier *v.* Julier, 62 Ohio St. 90..... 201
Juntunen *v.* Mining Co., 184 Mich. 341.....227, 261, 413

Kaaro *v.* Mining Co., 178 Mich. 661.....227, 413
Karwick *v.* Pickands, 171 Mich. 463..... 421
Keech *v.* Sanford, 1 W. & T. Eq. Cas. (4th Am. Ed.) 44.... 658
Kellar *v.* Wilson, 90 Ky. 350..... 98
Kelley *v.* Richardson, 69 Mich. 430..... 209
Kiley *v.* Railway Co., 138 Wis. 215..... 551
Kilgannon *v.* Jenkinson, 51 Mich. 240..... 332
Kilpatrick *v.* Railway Co., 74 Vt. 288..... 552
King *v.* Insurance Co., 140 Mich. 258..... 693
Kinney *v.* Folkerts, 84 Mich. 616..... 484
Kirby *v.* State, 7 Yerg. (Tenn.) 259..... 49
Kirtland *v.* Wanzer, 2 Duer (N. Y), 278..... 82
Knight *v.* Brown, 137 Mich. 396..... 20
Koskell *v.* Mining Co., 182 Mich. 586.....227, 259, 260
Krapp *v.* Insurance Co., 143 Mich. 369..... 474
La Fernier *v.* Lighter & Wrecking Co., 129 Mich. 596..... 211

Lahti *v.* Mining Co., 186 Mich. 18..... 227
Lambrecht, *In re*, 137 Mich. 450..... 530
Lee *v.* Clary, 38 Mich. 223..... 236
Lenox *v.* Fuller, 39 Mich. 268..... 267
Lepard *v.* Railroad Co., 166 Mich. 373.....540, 686
Lessnau *v.* Catholic Order of Foresters, 163 Mich. 111..... 474
Lewis *v.* Brick Co., 164 Mich. 489..... 167
——— *v.* Gollner, 129 N. Y. 227..... 89
Lewless *v.* Railroad Co., 65 Mich. 292..... 602
Light *v.* Railway Co., 165 Mich. 433..... 5
Little (C. H.) Co., People, *for use of*, *v.* Grant, 138 Mich. 60 .....357, 358
Livingstone *v.* Plate Glass Co., 146 Mich. 236..... 167
Livingway *v.* Railway Co., 145 Mich. 86..... 167
Lockwood *v.* Boom Co., 42 Mich. 536..... 517
Lore *v.* Manufacturing Co., 160 Mo. 608..... 552
Loud *v.* O'Brien, 167 Mich. 206..... 522
Ludden *v.* Hazen, 31 Barb. (N. Y.) 650 243
Lyle *v.* Circuit Judge, 157 Mich. 33..... 638
Lyon *v.* Lindblad, 145 Mich. 588..... 107

Macatawa Transportation Co. *v.* Insurance Co., 179 Mich. 443 693
McAunich *v.* Railroad Co., 20 Iowa, 338..... 552
McCartney *v.* Saul, 180 Mich. 502..... 56
McCauley *v.* Railroad Co., 167 Mich. 230..... 258
McCray Refrigerator, etc., Co. *v.* Woods, 99 Mich. 269..... 108
McFadden *v.* Wetherbee & Co., 63 Mich. 390..... 703
McGannon *v.* Insurance Co., 127 Mich. 636.....693, 695
McKesson *v.* Davenport, 83 Mich. 211..... 451
Mackin *v.* Axle Co., 187 Mich. 8..... 511

Digitized by Google

PAGE
Maclean *v.* Circuit Judge, 52 Mich. 257..... 535
McMurtry *v.* Investment Co., 103 Ky. 308.....92, 337
McRae *v.* Barber, 167 Mich. 314..... 521
Maki *v.* Copper Co., 180 Mich. 624..... 211
Mansbach's Estate, *In re*, 150 Mich. 348..... 268
Marquette, etc., R. Co. *v.* Harlow, 37 Mich. 554..... 517
Martin *v.* State, 77 Ala. 1..... 49
Mayer *v.* Mayer, 154 Mich. 386..... 202
Mead *v.* Merrill, 33 N. H. 437..... 14
Meade *v.* Bowles, 123 Mich. 696..... 153
Means, State, *ex rel.*, *v.* City of Hiawatha, 53 Kan. 477.... 96
Merlau *v.* Circuit Judge, 180 Mich. 393..... 35
Mesich *v.* Mining Co., 184 Mich. 363.....227, 261
Meyer *v.* Chair Co., 180 Mich. 604..... 363
Mikolojczak *v.* Chemical Co., 129 Mich. 80.....227, 260
Miller *v.* Morse, 23 Mich. 368..... 60
——— *v.* Toles, 183 Mich. 252..... 482
Millet Co. *v.* Andrews, 175 Mich. 350.....12, 107
Millspaugh *v.* Schultz, 180 Mich. 310..... 306
Minkkinen *v.* Mining Co., 169 Mich. 279..... 413
Minnesota Iron Co. *v.* Kline, 199 U. S. 593..... 551
Mirabile *v.* Murphy Co., 169 Mich. 522..... 259
Misch *v.* Lehman, 178 Mich. 225..... 89
Mishawaka Woolen Manfg. Co. *v.* Westveer, 191 Fed. 465
.....243, 248, 249
Missouri Pacific R. Co. *v.* Castle, 172 Fed. 841..... 552
——— *v.* Haley, 25 Kan. 35..... 552
——— *v.* Mackey, 127 U. S. 205..... 552
——— *v.* ———, 33 Kan. 298..... 552
Mobile, etc., R. Co. *v.* Turnipseed, 219 U. S. 35..... 552
Monaghan *v.* Insurance Co., 53 Mich. 238..... 566
Mondou *v.* Railroad Co., 223 U. S. 1..... 614
Moore *v.* Curry, 176 Mich. 456..... 89
——— *v.* Insurance Co., 143 Mich. 424..... 207
Moran *v.* Palmer, 13 Mich. 367..... 496
Moreland *v.* Millen, 126 Mich. 381..... 274
Moronen *v.* McDonnell, 177 Mich. 691..... 259
Morrison *v.* Carpenter, 179 Mich. 207..... 442
——— *v.* Hancock, 40 Mo. 561..... 355
Moss *v.* Railway Co., 182 Mich. 40..... 4
Mott *v.* Railway Co., 131 N. C. 234..... 552
Mueller *v.* Marsh, 116 Mich. 378..... 61
Murphy *v.* McGraw, 74 Mich. 318..... 306

Nash *v.* Geraghty, 105 Mich. 382..... 381
Nelson Grain Co. *v.* Railroad, 174 Mich. 80..... 377
Newton *v.* Construction Co., 184 Mich. 63..... 84
Nicholls *v.* Lumber Co., 157 Mich. 234..... 366
Nissly *v.* Railway Co., 168 Mich. 676.....670, 699
Norris *v.* Clark, 33 Minn. 476..... 14

O'Connor *v.* Carpenter, 144 Mich. 240..... 669
O'Dell *v.* Goff, 149 Mich. 152..... 268
——— *v.* ———, 153 Mich. 643.....267, 269

Digitized by Google

PAGE
Odin Coal Co. *v.* Denman, 185 Ill. 413..... 552
Ogontz Land, etc., Co. *v.* Johnson, 168 Pa. 178..... 340
O'Neill *v.* Assurance Co., 155 Mich. 564..... 474
——— *v.* Railway Co., 101 Mich. 437..... 684
Opinion of Justices, 209 Mass. 607..... 551

Pacific Timber Co. *v.* Windmill & Pump Co., 135 Iowa, 308.. 709
Palmer *v.* Bray, 136 Mich. 85..... 381
Panela *v.* Mining Co., 177 Mich. 669..... 227
Patterson *v.* Kasper, 182 Mich. 281..... 36
Peck *v.* Jenison, 99 Mich. 326..... 107
Pederson *v.* Railroad Co., 229 U. S. 146..... 616
Peirce *v.* Van Dusen, 78 Fed. 693..... 552
Pennell *v.* Transportation Co., 94 Mich. 247..... 422
Penny *v.* Croul, 76 Mich. 471..... 97
Pensacola, etc., R. Co. *v.* Atkinson, 20 Fla. 450..... 14
People *v.* County Auditors, 13 Mich. 233..... 273
——— *v.* Dumas, 161 Mich. 45..... 501
——— *v.* Finn, 57 Misc. Rep. 659..... 310
——— *v.* Fritch, 170 Mich. 258..... 49
——— *v.* Hall, 48 Mich. 482..... 640
——— *v.* Hemleb, 127 App. Div. 356..... 310
——— *v.* Hurlbut, 24 Mich. 44.....274, 553
——— *v.* McDowell, 63 Mich. 229..... 49
——— *v.* Mahaney, 13 Mich. 481..... 273
——— *v.* Moran, 65 Cal. 534..... 12
——— *v.* Newman, 99 Mich. 148..... 247
——— *v.* Reilly, 53 Mich. 260..... 273
——— *v.* Vitali, 156 Mich. 370.....500, 501
———, *for use of* the C. H. Little Co., *v.* Grant, 138 Mich. 60 .....357, 358
———, *for use of* T. B. Townsend Brick, etc., Co., *v.* Bowen, 187 Mich. 257.....358, 429
Perego *v.* Railway Co., 158 Mich. 225..... 685
Perry *v.* Railroad Co., 108 Mich. 130..... 363
Petaja *v.* Mining Co., 106 Mich. 463.....260, 413
Petrie *v.* Torrent, 88 Mich. 43..... 632
Pettinger *v.* People, 20 Mich. 336..... 311
Pettyplace *v.* Manufacturing Co., 103 Mich. 155..... 250
Phelps *v.* Whitaker, 37 Mich. 72..... 107
Phillips *v.* Township of New Buffalo, 68 Mich. 217..... 530
Plummer *v.* Mining Co. (C. C.), 55 Fed. 755..... 14
Pontiac Savings Bank *v.* Pipe Co., 178 Mich. 261..... 139
Porter *v.* Hopkins, 91 Ohio St. 74..... 550
Pratt *v.* Burhans, 84 Mich. 487.....245, 246
——— *v.* Circuit Judge, 177 Mich. 558..... 34
Price *v.* Township Board of Oakfield, 182 Mich. 216.....525, 530

Quackenbush *v.* Railroad Co., 62 Wis. 411, 71 Wis. 472.... 551

Rabidon *v.* Railway Co., 115 Mich. 390..... 320
Ramsden *v.* Hylton, 2 Ves. 304..... 662
Randall *v.* Randall, 37 Mich. 563..... 202
Rascher *v.* Railway Co., 90 Mich. 413..... 88

Digitized by Google

PAGE
Rayl *v.* Hammond's Estate, 95 Mich. 22..... 486
Raymond *v.* Day, 111 Mich. 443 319
Reading *v.* Waterman, 46 Mich. 107..... 236
Reed *v.* Bond, 96 Mich. 134..... 162
Retan *v.* Railway Co., 94 Mich. 146..... 484
Rex *v.* Charron, 15 Can. Crim. Cas. 241..... 310
Rice *v.* Auditor General, 30 Mich. 12..... 568
Rice & Floyd *v.* Hodge Bros., 26 Kan. 164..... 355
Richards *v.* Shaw, 67 Ill. 222..... 705
———, *In re*, 150 Mich. 421..... 502
Ridgeway *v.* City of Escanaba, 154 Mich. 68..... 426
Ritchie *v.* Stenius, 73 Mich. 563..... 82
Rivard *v.* Rivard, 109 Mich. 98.....268, 269
Robbins *v.* Magoon & Kimball Co., 186 Mich. 672..... 210
——— *v.* Vandermeiden, 182 Mich. 674..... 115
Robinson Manfg. Co. *v.* Bradley, 71 Wash. 611..... 428
Rodgers *v.* Lamb's Estate, 137 Mich. 241..... 75
Rogers *v.* Kee, 171 Mich. 551..... 482
Rumsey *v.* Griffin, 138 Mich. 413..... 99

St. Mary's Power Co. *v.* Water-Power Co., 133 Mich. 470.... 68
Sanborn Co. *v.* Johnson, 148 Mich. 405..... 521
Scandinavian Society *v.* Lindquist, 133 Mich. 91..... 176
Scendar *v.* Copper Co., 169 Mich. 665..... 413
Schadt *v.* Brill, 173 Mich. 647..... 89
Schaible *v.* Railway Co., 97 Mich. 318..... 539
Schneider *v.* City of Detroit, 72 Mich. 242..... 96
——— *v.* Vosburgh, 143 Mich. 476..... 282
Schoepper *v.* Chemical Co., 113 Mich. 582..... 211
Schroeder *v.* Car Co., 56 Mich. 132..... 122
Scougale *v.* Sweet, 124 Mich. 315..... 312
Seeley *v.* Price, 14 Mich. 545..... 280
Seitz *v.* Machine Co., 141 U. S. 510..... 108
Sharp *v.* Ropes, 110 Mass. 381..... 92
Shaw *v.* Railway Co., 123 Mich. 629..... 484
Shelden *v.* Insurance Co., 124 Mich. 303.....693, 695
Silberman *v.* Uhrlaub, 102 N. Y. Supp. 299..... 89
Silverstone *v.* Assurance Corporation, 176 Mich. 525..... 566
Simone *v.* Kirk, 173 N. Y. 7..... 167
Sisson Lumber, etc., Co. *v.* Haak, 139 Mich. 383..... 703
Smith *v.* Walker, 57 Mich. 456..... 669
Sonn *v.* Heilberg, 38 App. Div. 515..... 92
Sonsmith *v.* Railroad Co., 173 Mich. 57..... 541
Sowles *v.* Wilcox, 127 Mich. 166..... 162
Spaulding *v.* O'Connor, 119 Mich. 45..... 99
Stahl *v.* Dehn, 72 Mich. 645..... 162
State *v.* Chamberlain, 112 Minn. 52.....310
——— *v.* Dickinson, 41 Wis. 299..... 49
——— *v.* Goodrich, 19 Vt. 116..... 49
——— *v.* Hayward, 62 Minn. 474..... 49
——— *v.* Howard, 32 Vt. 380..... 49
——— *v.* Mortensen, 26 Utah, 312..... 49
——— *v.* Peffers, 80 Iowa, 580..... 49

Digitized by Google

PAGE
State *v.* Penny, 42 Mont. 118..... 310
——— *v.* Power, 24 Wash. 34..... 49
——— *v.* Thompson, 132 Mo. 301, 141 Mo. 408..... 49
——— *v.* Winner, 17 Kan. 298..... 49
———, *ex rel.* Davis-Smith Co., *v.* Clausen, 65 Wash. 156.. 550
———, *ex rel.* Means, *v.* City of Hiawatha, 53 Kan. 477.... 96
———, *ex rel.* Yaple, *v.* Creamer, 85 Ohio St. 349..... 550
State Savings Bank *v.* Circuit Judge, 95 Mich. 100..... 236
Stickney *v.* Parmenter, 35 Mich. 237..... 194
Stoney Creek Woolen Co. *v.* Smalley, 111 Mich. 321..... 35
Stott *v.* Avery, 156 Mich. 674..... 89
Stroh *v.* O'Hearn, 176 Mich. 164..... 580
Sturgis *v.* Railway Co., 72 Mich. 619..... 682
Sullivan *v.* Ross Estate, 98 Mich. 570..... 250
Summers *v.* Beeler, 90 Md. 474..... 92
Swartz *v.* Board of Commissioners of Lake County, 158 Ind. 141 96
Swetland *v.* Swetland, 3 Mich. 482..... 162
Swift Co. *v.* United States, 111 U. S. 22..... 25

Talbot Paving Co. *v.* Gorman, 103 Mich. 403..... 117
Tallmadge *v.* Bank, 26 N. Y. 105.....89, 91
Teal Lake Mining Co. *v.* Olds, 178 Mich. 335..... 522
Thomas *v.* Railroad Co., 129 N. C. 392..... 552
——— *v.* State, 67 Ga. 460..... 49
——— *v.* Sullivan, 138 Mich. 265..... 565
Thompson *v.* Railroad & Banking Co., 54 Ga. 509..... 552
——— *v.* Sanborn, 52 Mich. 141..... 518
Thomson *v.* Railroad Co. (D. C.), 205 Fed. 203..... 617
Thorp *v.* Bateman, 37 Mich. 68..... 75
Tilley *v.* Commonwealth, 89 Va. 136..... 49
Tillotson *v.* Gregory, 151 Mich. 128.....89, 343
——— *v.* Webber, 96 Mich. 144..... 486
Todd (A. M.) Co. *v.* Insurance Co., 137 Mich. 188..... 693
Totten *v.* Totten, 172 Mich. 565..... 442
Townsend (T. B.) Brick, etc., Co., People, *for use of*, *v.* Bowen, 187 Mich. 257.....358, 429
Tralich *v.* Railway Co. (D. C.), 217 Fed. 675..... 617
Trice *v.* Comstock, 121 Fed. 620..... 658
Trigg *v.* Read, 5 Humph. (Tenn.) 529..... 663
Tucker *v.* Van Winkle, 142 Mich. 210..... 521
Turnbull *v.* Railroad Co., 183 Mich. 213.....377, 378
——— *v.* Richardson, 69 Mich. 400..... 484
Tutt *v.* Railway Co., 104 Fed. 741..... 323
Tyler *v.* Wright, 164 Mich. 606, 171 Mich. 579..... 563

United States *v.* Nardello, 15 D. C. (4 Mackey) 503..... 49
United States Cement Co. *v.* Cooper (Ind. App.), 82 N. E. 981. 552

Van Den Bosch *v.* Bouwman, 138 Mich. 624.....248, 249
Vincent *v.* Evans, 165 Mich. 696..... 496
Vindicator, etc., Mining Co. *v.* Firstbrook, 36 Colo. 498..... 552
Voigt *v.* Car Co., 112 Mich. 504..... 363
Vrelenich *v.* Mining Co., 188 Mich. 407..... 261

Digitized by Google

PAGE
Waldrep *v.* Railroad & Banking Co., 7 Ga. App. 342..... 687
Walker *v.* Railroad Co., 135 N. C. 738..... 552
——— *v.* Renner, 60 N. J. Eq. 493..... 337
Ward *v.* Oliver, 129 Mich. 301..... 268
——— *v.* Warner, 8 Mich. 508..... 517
Warrick *v.* State, 125 Ga. 133..... 49
Wasey *v.* Insurance Co., 126 Mich. 119..... 475
——— *v.* Whitcomb, 167 Mich. 58..... 245
Watrous *v.* Allen, 57 Mich. 362..... 89
Way *v.* Root, 174 Mich. 418..... 406
Wayne Co. Road Commissioners *v.* Auditors, 148 Mich. 255.. 274
Weber *v.* Weber, 47 Mich. 569..... 35
Wegner *v.* Herkimer, 167 Mich. 587.....34, 36
Weidman *v.* Willson, 153 Mich. 82..... 519
Welch *v.* Railroad Co., 147 Mich. 207..... 542
——— *v.* Ware, 32 Mich. 78..... 87
Wells *v.* Railroad Co., 184 Mich. 1.....442, 564
Whipple *v.* Farrar, 3 Mich. 436..... 449
Whiting *v.* Butler, 29 Mich. 122..... 450
Wierengo *v.* Insurance Co., 98 Mich. 621..... 253
Wilcox *v.* Railroad Co., 43 Mich. 584..... 306
William Fox Amusement Co. *v.* McClellan, 62 Misc. Rep. 100.. 310
Williams *v.* Olson, 141 Mich. 580..... 521
——— *v.* Robb, 104 Mich. 242..... 117
Willis *v.* Jelineck, 27 Minn. 18..... 449
Wilmington Star Mining Co. *v.* Fulton, 205 U. S. 60..... 551
Winckowski *v.* Dodge, 183 Mich. 303..... 375
Winnie *v.* Railway Co., 160 Mich. 334.....684, 686, 688
Witteman Co. *v.* Malting & Brewing Co., 183 Mich. 227.... 108
Wood *v.* City of Detroit, 188 Mich. 547.....575, 576
Worden Grocer Co. *v.* Blanding, 161 Mich. 254.....245, 248
Worden Lumber, etc., Co. *v.* Railway Co., 168 Mich. 74.... 566
Wright *v.* Senn Estate, 85 Mich. 191..... 436
Wyandotte Brewing Co. *v.* Insurance Co., 144 Mich. 440.... 253
Wykes *v.* Ringleberg, 49 Mich. 567..... 332

Yaple, State, *ex rel.*, *v.* Creamer, 85 Ohio St. 349..... 550
Yerkes *v.* Smith, 157 Mich. 557..... 310
Young *v.* Bonding Co., 228 Pa. 373 358

Zap *v.* Mining Co., 184 Mich. 437.....260, 413
Zikos *v.* Railroad & Navigation Co. (C. C.), 179 Fed. 893.... 617
Zucker *v.* Karpeles, 88 Mich. 413..... 568

Digitized by Google

LAWS CITED AND CONSTRUED.

CONSTITUTION OF UNITED STATES.

	PAGE
14th Amend.	554

UNITED STATES STATUTES.

	PAGE
35 U. S. Stat. 66 (4 U. S. Comp. Stat. 1913, § 8659)	613
36 U. S. Stat. 840	517

CONSTITUTION OF MICHIGAN.

	PAGE		PAGE
Art. ii, § 1	575	Art. viii, §§ 20-23	556
Art. v, § 21	530	—— § 24	557

COMPILED LAWS 1897.

	PAGE		PAGE
§§ 342	640	§§ 10237	567
3893	98, 99	10247	486
5912	309-312	10268	285
9533	169, 172	10564	171
9536, 9537	169	11207	519
9797 *et seq.*	311	11334	310-312
10213	267	11502, 11503	473

HOWELL'S STATUTES (2D ED.).

	PAGE		PAGE
Vol. 1, § 1839	98, 99	Vol. 4, §§ 11420, 11421	169
—— § 1898	666	—— § 11640	79
—— § 2021	667	—— § 11965	71
—— § 2060	666	Vol. 5, § 12857	267
Vol. 2, § 2626 *et seq.*	115	—— § 12969	285
—— § 5261	309	—— § 13365	171
Vol. 4, § 11417	169, 172	—— § 14750	310

SESSION LAWS.

	PAGE		PAGE
1883, Act 253 (Local), § 5.	275	1893, Act 206	69
1885, Act 101	486	—— —— § 126	67, 68
—— Act 153	69	—— —— § 127	666-668, 670
—— —— § 115	67, 68	1897, Act 167	692, 693
1889, Act 195	67	—— Act 180	43, 44
1891, Act 200	67, 68	—— Act 229	497
—— Act 343 (Local), § 3.	276	1899, Act 107	667

Digitized by Google

SESSION LAWS—Continued.

	PAGE
1899, Act 204	522
—— Act 230	202
—— Act 232	43
—— —— § 3	44
1901, Act 52	486
—— Act 63, § 1	448
1903, Act 84 666-668,	670
1905, Act 142	496
—— Act 184, § 3 500,	502
—— Act 187.....347,	417
—— —— § 2.....423-425,	427
—— —— § 3 416,	427
—— —— § 4 426,	427
—— Act 211.....667,	670
—— Act 466 (Local), chap. 6, § 3, subds. 32, 45	96
—— —— —— § 13	96
1907, Act 72, § 8	275
—— Act 101	115
1909, Act 104 .....506, 540,	613
—— —— § 2.....295,	541
—— Act 234	475
—— Act 279.....550,	557
—— —— § 2	558
1909, Act 300, § 22	111
1911, Act 128.....692,	699
—— Act 203	557
1912 (Extra Session), Act 10 .....511, 549,	550
—— —— —— pt. 1, §§ 1, 3, 4	506
—— —— —— —— §§ 5, 6	507
—— —— —— —— § 7..	508
—— —— —— —— § 8.. 508,	509
—— —— —— pt. 2, § 15 577,	578
—— —— —— —— §§ 16-18	578
—— —— —— pt. 4, § 1..	505
—— —— —— pt. 6, § 5..	575
1913, Act 5	557
—— Act 50	553
—— Act 100, § 15	572
—— Act 164.....137,	139
1915, Act 64	249
—— Act 169.....527-531	

CIRCUIT COURT RULE.

	PAGE
No. 7*d*	473

Digitized by Google

JUNE TERM, 1915.*

MOSS *v.* DETROIT & MACKINAC RAILWAY CO.

1. CARRIERS — RAILROADS — PERSONAL INJURIES — CONTRACT — EVIDENCE.

   In an action against a railroad company by an infant 13 years of age for injuries received by being carried past his destination, and having to walk back a distance of nearly eight miles, in a storm, evidence that plaintiff's father purchased a ticket for him from the agent of another railroad, who was authorized to sell the same; that the ticket asked for was to Linwood, and the ticket received was to Linwood Park; that the conductor of defendant's train accepted the ticket without objection and promised to tell him when the train reached the station; that the defendant's brakeman told plaintiff when he got on that the train went to Linwood, *held*, sufficient to establish a contract to carry plaintiff to Linwood Park.

2. SAME—CONTRIBUTORY NEGLIGENCE—QUESTION OF FACT.

   It cannot be said, as matter of law, that plaintiff, at his age, in a strange place, and without any instruction from defendant's employees, or any one else, was guilty of contributory negligence in not stopping at some house instead of continuing his journey on foot to his destination.

3. APPEAL AND ERROR—EVIDENCE.

   Where plaintiff recovered in the court below, this court, on appeal, is bound to take that view of the evidence most favorable to plaintiff.

4. DAMAGES—PERSONAL INJURIES—PROXIMATE CAUSE.

   Whether the damages alleged in a particular case are the proximate results of the injury, is usually a question of fact for the jury.

---

*Continued from Vol. 187.

Digitized by Google

5. CARRIERS—DAMAGES—PROXIMATE CAUSE—NEGLIGENCE.
Where the evidence showed that plaintiff, who had previously been in good health, was suffering from cold and exhaustion when he reached his destination, gradually growing worse until pneumonia set in, and no exposure or cold, other than the one alleged, is shown by the testimony, the court was justified in submitting to the jury the question whether plaintiff's illness from penumonia was a proximate result of defendant's negligence.

6. SAME—DAMAGES—CONJECTURE—INSTRUCTIONS—TORT.
Although plaintiff would have had a considerable distance to walk to his destination, and it is impossible for the jury to determine what share of his illness was caused by the increased distance in being carried past the station, it was not error for the court to submit the question of damages to the jury, under proper instructions; this being an action in the nature of tort.

7. DAMAGES—CARRIERS—EXCESSIVE VERDICT.
Where plaintiff, an infant 13 years of age, brought an action for injuries caused by severe cold and resulting pneumonia, contracted by exposure and exhaustion in reaching his destination on foot after being carried past his station by defendant's train, necessitating an operation and large quantities of pus taken from his side, from which he had not fully recovered at the time of the trial, a verdict for $600 cannot be said to be excessive.

Error to Bay; Connine, J., presiding. Submitted April 21, 1915. (Docket No. 155.) Decided September 28, 1915.

Case by William Moss, an infant, by next friend, against the Detroit & Mackinac Railway Company for personal injuries. Judgment for plaintiff. Defendant brings error. Affirmed.

Henry, Henry & Henry, for appellant.

Thomas G. Baillie (*R. L. Crane*, of counsel), for appellee.

Digitized by Google

PERSON, J. Plaintiff, who was a little more than 13 years old, with his sister Pearl, who was still younger, went from their home in Saginaw to pass Christmas with their grandfather, near the village of Linwood. This was on the 23d day of December, 1911. From Saginaw to Bay City their route was by way of the Pere Marquette Railroad, and from Bay City over the defendant's road. The children were traveling alone, and when the conductor on defendant's road took up their tickets, after leaving Bay City, he promised, as they claim, that he would notify them on reaching Linwood, and tell them when to get off. They say that they relied upon this promise and did not hear the name Linwood called at any station. After a time the plaintiff, thinking they had traveled far enough to have reached their destination, again spoke to the conductor, who told them that they had already passed Linwood, and had better hurry and get off, or they would be carried still further. They thereupon left the train, at a flag station called Mitchie, and from there walked back, through the village of Linwood, to their grandfather's home, a distance of nearly eight miles, reaching there some time after dark. The day was stormy and there was snow on the ground. The boy carried a suit case weighing some 15 pounds, and most of the way also a basket. When he reached his grandfather's he was tired, had contracted a severe cold, and could not eat his supper. From that time on he claims that he never felt well and always had a cold; that his lungs were continually sore; and that he suffered from pains in his side, as well as in other ways. In May he became very ill with pneumonia, and was taken to a hospital, where an operation was performed, and large quantities of pus taken from his side. He had not fully recovered at the time of the trial. The jury awarded him a verdict for $600.

Before the trial of this case in the circuit court, the

Digitized by Google

sister had obtained a judgment in an action for the same alleged negligence, and that judgment had been affirmed by this court. *Moss* v. *Railway Co.*, 182 Mich. 40 (148 N. W. 204).

1. It is urged by defendant that no contract was established by which it was required to carry the plaintiff from Bay City to Linwood Park, or to any other station on its road. In this we think defendant is mistaken. There is evidence that tickets for the children were purchased by their father in Saginaw at the Pere Marquette depot, where the agent was authorized to sell tickets over defendant's road. It is true that the father asked for tickets to Linwood, and there was, at the time, no such station on defendant's line; but there was a station at Linwood Park, about two miles from the village of Linwood, and when tickets were asked for to Linwood the agent would say "Linwood Park" and sell the tickets to that place. The children testified that the conductor on defendant's road accepted their tickets without objection and promised to tell them when the train should have reached the station, so they might get off. They also testified that the brakeman told them, when they got on defendant's train, that it went to Linwood. There was plenty of evidence from which the jury could justly find that the children held tickets to Linwood Park, which were accepted by defendant's officials, and that the station was spoken of, by those connected with the road, both as Linwood Park and Linwood.

2. The trial judge left it for the jury to determine whether the plaintiff was guilty of any negligence that contributed to his injury. This was sufficient. It cannot be said, as matter of law, that the plaintiff, at his age, in a strange place, and without any instruction from defendant's employees, or anyone else, was guilty of contributory negligence in not stopping at some house, instead of continuing his journey on foot to his

Digitized by Google

grandfather's. This question was disposed of, substantially, in the other case.

3. It is urged that plaintiff's illness from pneumonia was not shown to have been a proximate result of defendant's negligence, and that the jury should not have been allowed to consider it in connection with the question of damages. But on this appeal we are bound to take that view of the evidence most favorable to the plaintiff. Looking at it in this way, we find that up to time of leaving defendant's train, after having been carried beyond his station, this boy of 13 had always been in good health. Upon reaching his grandfather's house, in the evening, having walked some eight miles, over a snowy road, on a more or less stormy winter day, carrying a heavy valise and a basket, he was too exhausted to eat his supper, and complained of having chills and not feeling well. After that he always had a cold, his lungs were continually sore, and he suffered from pains in his side. About the middle of January a physician was called, who has continued his treatment ever since. In April this physician thought he saw symptoms of pleuropneumonia, and on the 20th of May pneumonia was pronounced and severe. Later the plaintiff was taken to a hospital, where a surgical operation was performed, and a large amount of pus, which had been a long time in forming, was taken from his side. From this testimony it might be found that the boy's illness, resulting from his exhaustion and the cold contracted during his exposure, continued gradually to grow worse until pneumonia set in. The doctors agree that exposure and colds are the most common causes of pneumonia, and no exposure or cold, other than the foregoing, is shown by the testimony. Whether the damages alleged in a particular case are the proximate results of the injury is usually a question of fact for the jury. *Light* v. *Railway Co.*, 165 Mich. 433 (130 N. W. 1124, 34 L. R. A. [N. S.] 282); 4

Digitized by Google

Elliott on Railroads, § 1799. And we think the court justified in leaving that question to them in this instance.

4. It is further urged that, if plaintiff had not been carried by Linwood Park, the walk to his grandfather's would have equaled a considerable portion of that which he did take in getting back from Mitchie; that it was impossible for the jury to determine what share of his subsequent illness, if any, was attributable to the increased distance; and hence that the award of any damage was mere conjecture, and should not have been permitted. This, however, is an action in the nature of tort. In finding that plaintiff was wrongfully carried by his station, the jury have found that he is entitled to such damages as will compensate him for the injury. To refuse him all damages because their proper amount cannot be accurately measured would throw the entire loss upon the injured party, to the complete acquittal of the wrongdoer. As was said in *Allison* v. *Chandler*, 11 Mich. 542, 555:

"When from the nature of the case, the amount of damages cannot be estimated with certainty, or only a part of them can be so estimated, we can see no objection to placing before the jury all the facts and circumstances of the case, having any tendency to show damages, or their probable amount, so as to enable them to make the most intelligible and probable estimate which the nature of the case will permit. This should, of course, be done with such instructions and advice from the court as the circumstances of the case may require, and as may tend to prevent the allowance of such as may be merely possible, or too remote or fanciful in their character to be safely considered as the result of the injury."

The rights of the defendant were very carefully protected by the instructions given and we see no error in the submission of the question of damages to the jury.

5. Under all of the circumstances, it cannot be said

Digitized by Google

that the verdict was clearly excessive, nor that it was against the weight of evidence.

The judgment is affirmed.

BROOKE, C. J., and KUHN, STONE, OSTRANDER, BIRD, MOORE, and STEERE, JJ., concurred.

This case having been submitted on briefs, without oral argument, was reassigned after the death of Justice MCALVAY.

LOUD v. SOLOMON.

1. WITNESSES—RE-EXAMINATION—DISCRETION OF COURT.
   After a witness has been examined, he may be subjected to further interrogation by the party by whom he is called; the extent of such re-examination resting largely within the discretion of the trial court.

2. SAME—ABUSE OF DISCRETION.
   Where, while plaintiff was upon the witness stand, at the close of a redirect examination, and before recross-examination began, the court asked that each counsel finish with the witness, and no further questions were asked by plaintiff's counsel, and, after a short recross-examination, plaintiff's counsel asked the privilege of asking a few more questions, the refusal of such request was not an abuse of discretion by the court.

3. FRAUD—EVIDENCE—CORPORATIONS.
   In an action upon promissory notes given in payment of stock in a cement corporation, which defendant claims he was induced to purchase by means of false and fraudulent representations as to the financial condition and property of said company, the articles of association, and the annual reports of the company to the secretary of State were properly admissible in evidence.

Digitized by Google

4. EVIDENCE—DEPOSITIONS—STOCK AND STOCKHOLDERS—VALUE OF STOCK.

A deposition of a mining engineer, offered in evidence for the purpose of showing that other plants in the immediate vicinity, started on the same plan as the corporation in which defendant purchased stock, were being successfully operated, to substantiate the representations that there was no water in the stock, that the company was well financed, and that the value of the land made the stock worth $3.50 a share, the purchase price, was inadmissible, where it does not appear from the deposition that any questions were asked as to the manner of financing the neighboring companies, the valuation which they placed upon the land taken, or the scheme of their stock issues generally, so as to show that the stock issues of those companies were not watered.

5. CORPORATIONS—STOCK—"WATERED STOCK."

"Watered" or fictitious stock is stock that is issued as fully paid up when, in fact, the whole amount of the par value thereof has not been paid in, or which purports to represent, but does not represent, in good faith, money paid into the treasury of the company, or money's worth actually contributed to the working capital of the concern.

6. EVIDENCE—CORPORATIONS—FRAUD—FULLY FINANCED.

Where defendant claimed that it had been falsely and fraudulently represented to him, in the sale of stock, that the company had been fully financed, it was not error for the court to exclude a question as to whether the company, with $3,500 in cash available, and its 400 acres of land paid for, could be made a practical or feasible scheme by the sale of stock as the plant progressed, as it could not be said that the answer would show that the company had been fully financed, where its success depended upon the uncertainty of stock sales.

7. TRIAL—INSTRUCTIONS—FRAUD—APPEAL AND ERROR.

Where the court charged the jury that it was undisputed that plaintiff's agent made substantially the same representations to defendant that plaintiff made, and the agent testified that he attempted to sell stock to defendant, at plaintiff's request, that he received his information concerning the financial condition of the company from plaintiff, and that he made the representations claimed by defendant, and plaintiff admitted that the agent assisted

Digitized by Google

in the sale of the stock, while it is doubtful whether the instruction was warranted, yet, in view of the entire charge, and the almost conclusive evidence in support of these facts, it cannot be said that the jury were misled.

Error to Iosco; Connine, J. Submitted April 21, 1915. (Docket No. 12.) Decided September 28, 1915.

Assumpsit by H. Kimball Loud against Selig Solomon and another. Judgment for defendants. Plaintiff brings error. Affirmed.

Henry, Henry & Henry, for appellant.

Jaharus & Rawden (*Joseph H. Cobb,* of counsel), for appellees.

KUHN, J. This action is brought to recover on two promissory notes, given in part payment for stock in a corporation known as the El Cajon Portland Cement Company. This company was organized in May, 1903, by the plaintiff and 15 others, with a capital stock of $500,000, divided into 50,000 shares, of a par value of $10 each. Each incorporator subscribed for 100 shares, and four of them, including the plaintiff and one Rogers, subscribed for the balance as trustees. The plaintiff and Rogers transferred to the company land owned by Rogers, which had been deeded to the Alpena County Savings Bank to secure a loan of $1,500, and 355 acres of land which had been acquired by plaintiff and Rogers for $1,100, and took in return from the company $1,000 in cash and $85,000 of the capital stock of the corporation.

After its organization the corporation entered into a contract with Mr. Rogers for the construction of its plant for $325,000 of its capital stock and $500,000 of bonds to be secured by a mortgage. It was estimated that the plant would cost $400,000, and Mr. Rogers was to undertake to sell the stock. Rogers and

Digitized by Google

others then organized a corporation known as the Rogers Construction Company, and turned this contract over to it as its principal asset. Plaintiff herein became the treasurer and general manager of the Construction Company.

In the summer of 1903 the plaintiff opened negotiations to sell the defendant stock in the Cement Company, and in January, 1904, the defendant entered into a contract with the Rogers Construction Company for the purchase of 2,000 shares of the Cement Company's stock at $3.50 per share, payment to be made partly in notes. The notes involved in this controversy are renewals of two of these notes. The notes were executed by the defendant Selig Solomon in the name of Harry Solomon, and payment guaranteed in his own name. They were of the following tenor:

"$500.00. AU SABLE, MICH., August 1, 1904.

"January 1, 1905, after date, I promise to pay to H. Kimball Loud, or order, five hundred dollars at Dodds & McNichol's Bank, Oscoda, Michigan. Value received.

"[Signed] HARRY SOLOMON."

On the back of this note appeared the indorsements of Selig Solomon and H. Kimball Loud and the following guaranties:

"For value received, I, the undersigned, hereby waive protest on the within note, and guarantee payment of same. SELIG SOLOMON."

"For value received, the undersigned hereby waive protest and demand for payment, and guarantee payment of same. H. KIMBALL LOUD."

"$500.00. Due Feb. 8th.

"AU SABLE, MICH., Dec. 5, 1904.

"Two months after date I promise to pay to the order of H. Kimball Loud five hundred and no/100 dollars at bank of Dodds & McNichols, Oscoda, Michigan, value received. [Signed] HARRY SOLOMON, per."

This note was also indorsed by Selig Solomon and H. Kimball Loud, and bore this guaranty:

Digitized by Google

"For value received, I hereby guarantee the payment of the within note, and waive demand and notice of protest of same. H. KIMBALL LOUD.

The notes were discounted at the bank by the plaintiff, but were not paid at maturity, and were afterwards paid by the plaintiff. The defendant resisted the payment of the notes on the ground that he was induced to buy the stock of the Cement Company by false and fraudulent representations made to him by the plaintiff and one Ebling, as agent for the plaintiff. The specific representations claimed to have been made are set out in the plea of the defendant, and are as follows:

"That the said El Cajon Portland Cement Company owned 400 acres of land, for which it had paid $200 per acre; that nearly all the stock had been subscribed for by *bona fide* purchasers; that Frank W. Gilchrist and other capitalists of the city of Alpena owned a large amount of the stock; that said company was fully financed; that the property of the company made the stock worth the sum of $3.50 per share; that there was no water in the stock; and that all its lands were free and clear of indebtedness."

From a verdict and judgment of no cause of action, the plaintiff removed the case to this court for a review of alleged errors in the admission and rejection of evidence and in the charge of the trial judge.

It appears that while the plaintiff was upon the witness stand, at the close of a redirect examination and before the recross-examination began, the court stated:

"I will now ask that each counsel finish with the witness."

No further questions were thereupon asked by plaintiff's counsel, and after a short recross-examination plaintiff's counsel asked the privilege of asking the witness a few more questions, which request was not

Digitized by Google

acceded to, and the witness was excused. This refusal on the part of the court is assigned as error.

The general rule seems to be that, after a witness has been examined, he may be subjected to further interrogation by the party by whom he is called; but the extent of such re-examination rests largely within the discretion of the trial court. Here the plaintiff had been re-examined, and a recross-examination had also been held. We are not impressed that there was an abuse of discretion on the part of the trial judge in refusing counsel the privilege of further redirect examination under the circumstances here set forth. See 40 Cyc. p. 2520; *People* v. *Moran*, 65 Cal. 534 (4 Pac. 545); *Fowler* v. *Town of Strawberry Hill*, 74 Iowa, 644 (38 N. W. 521); *Anderson Transfer Co.* v. *Fuller*, 174 Ill. 221, 227 (51 N. E. 251); *Brown* v. *State*, 72 Md. 468, 475 (20 Atl. 186).

It is also urged that the court erred in admitting the articles of association of the company and the annual reports filed with the secretary of State. It is well established that in cases of fraud a wide range of examination is allowed, and we do not think that the examination here permitted went beyond the proper scope of inquiry. The corporation papers and the reports made to the secretary of State show who the stockholders were at the inception of the company, the stock owned by each, and also the financial condition of the company, and we are of the opinion that it was proper to show that the plaintiff was making false representations regarding the financial condition and property of this company, and that no error was committed in the admission of this evidence, in view of the claims of the defendant as to the fraudulent representations. *Millet Co.* v. *Andrews*, 175 Mich. 350 (141 N. W. 578).

It is the claim of the plaintiff that error was committed by the trial judge in not allowing proofs which

Digitized by Google

it is claimed showed that other plants in the immediate vicinity of the plant of the El Cajon Portland Cement Company, started on the same plan, were being successfully operated. For this purpose the deposition of Mr. Henry H. Hindshaw, who is a mining engineer, was offered in evidence. It is claimed that this evidence could be said to substantiate the representations that there was no water in the stock, and that the company was fully financed, and that the value of the land made the stock worth $3.50 a share. In this connection, it is well to consider what is meant by watered stock. Cook on Stock and Stockholders and Corporation Law defines it as follows:

"By watered or fictitious stock is meant stock which is issued as fully paid up, when in fact the whole amount of the par value thereof has not been paid in. If any amount less than the whole face value of the stock has not been paid, and the stock has been issued as fully paid, then the stock is watered to the extent of the deficit. Watered stock is, accordingly, stock which purports to represent, but does not represent, in good faith, money paid in to the treasury of the company, or money's worth actually contributed to the working capital of the concern." Section 13.

It is also said with reference thereto that:

"There are three different ways in which watered stock is issued: It is done by issue of certificates of stock for an amount of money less than the par value of the stock, the certificates asserting on their face that the full value has been paid in; or for property or construction work taken at a fraudulent overvaluation; or by a stock dividend, the equivalent par value of which has not been permanently added to the capital stock." Section 29.

It is the claim of the plaintiff that there was no overvaluation of the property, and that it was worth what it was represented to be for the purposes for which it was going to be used; and to show that there was no overvaluation, the testimony was offered that

Digitized by Google

there were other cement plants in the vicinity, working on the same soil at locations no more available, and that they were successful.

In our opinion, bearing in mind that the issue as presented was whether the stock was watered, the company fully financed, and the property of such a character as to make the stock worth $3.50 a share, this testimony was properly rejected as offered. To make it competent, an offer should have been made to show that, in addition to the similarity in soil and means of access to the market, the material facts in the organization of the neighboring companies were substantially the same. It does not appear from the deposition of Hindshaw, upon which the plaintiff principally relies, that any questions were asked as to the manner of financing the neighboring companies, the valuation which they placed upon the land taken, or the scheme of their stock issues generally, so as to show that the stock issues of those companies were not watered. Without proof on these points, the evidence offered could have no bearing on the issues in this case. See *Plummer* v. *Mining Co.* (C. C.), 55 Fed. 755; *Pensacola, etc., R. Co.* v. *Atkinson,* 20 Fla. 450; *Norris* v. *Clark,* 33 Minn. 476 (24 N. W. 128); *Mead* v. *Merrill,* 33 N. H. 437.

The witness Hindshaw was asked the following question:

"In your judgment, if the land was purchased and paid for, known as the El Cajon lands, assuming there were 400 acres, located as they are, and $3,500 in cash was available to start the construction of a cement plant, would it or would it not be a practical or feasible scheme to complete and make prosperous a cement industry by the sale of stock as the plant progressed, until it was on a paying basis?"

An objection to this question was sustained by the trial court. Assuming that the witness had qualified

Digitized by Google

himself as an expert to answer this question, concerning which there is some doubt, its only purpose could be to substantiate the representation that the company had been fully financed. However, if an answer had been allowed to the question, it could not be said that the answer would show that the company had been fully financed, as under the question as stated the success of the plant would depend upon the sale of stock as it progressed, and it certainly could not be said that it was on a solid financial basis as long as its success depended upon the uncertainty of stock sales in order to make it possible for operations to proceed.

During his charge the court said to the jury:

"It is further claimed by Mr. Solomon that Mr. Ebling, acting as the agent of Mr. Loud, also came to him and made him certain representations for the purpose of inducing him to buy this same stock. It is claimed by Mr. Solomon that substantially the same representations were made to him by Ebling that were made to him by Loud. Now, that does not seem to be disputed, as I can recall in this case, and that Mr. Ebling was the agent of Mr. Loud; and, if he was, then Mr. Loud would be bound by such representations as Mr. Ebling made."

It is claimed by the appellant that the court erred in charging the jury that it was not disputed that the same representations were made to the defendant by the plaintiff and the witness Ebling, and that Ebling was the agent of the plaintiff. At the beginning of his charge, the court stated the following:

"Now, it is my purpose to outline to you in my charge the claims that these parties make here. I do not do that for the purpose of directing you as to what your verdict shall be, nor for the purpose of intimating what the facts are, but I do it for the purpose of laying the facts before you—first, the issues of fact; and, second, the issues of law. It is your duty to accept and follow and apply to the facts the directions given you by the court; otherwise, your action might

Digitized by Google

take some illegal direction and not result justly. In speaking of the claims that the parties make here, I do not want to be understood as intimating what the facts are, or what your verdict ought to be; but I do it for the purpose of laying the issues before you."

Again he said:

"Now, the plaintiff, on the other hand, Mr. Loud, denies that he made these representations as claimed by Solomon, and he states to you what he did say to Solomon. Mr. Loud also denies that Mr. Ebling made any such representations to Solomon. So you see that gives rise to disputed questions of fact, and those questions of fact are solely for you to determine and pass upon. I haven't any right or any business to pass upon it, or decide it one way or the other. That is your duty, and it is your duty to determine whether any or all of these representations were made, and, if they were made, whether they were false. If you find they were not made, then the defense fails, and your verdict would be for the plaintiff for the amount of his notes and interest."

It also appears from the testimony of Mr. Ebling that he approached Mr. Solomon with the purpose of interesting him in the purchase of stock in this company at the request of plaintiff, and that he received such information as he possessed concerning the El Cajon Company and its financial condition from the plaintiff, for the purpose of conveying it to Solomon and inducing him to buy stock in the company. He was to receive 10 per cent. for his services in the sale of the stock. He testified that he made the representations with reference to the company and its condition, as claimed by the defendant. The plaintiff, while on the stand, in answer to questions, admitted that Mr. Ebling assisted in the sale of the stock. It may be admitted that it is doubtful whether the record warrants the statement that it was not disputed that Ebling had made the same representations to the defendant as were made to him by Loud, and that Ebling was act-

Digitized by Google

ing as the agent for Loud. Nevertheless, we are of the opinion that, in view of the entire charge as given and the almost conclusive evidence in support of these facts, it cannot be said to have been prejudicial error, as we are satisfied that what was said by the trial court did not mislead the jury.

We have examined the other assignments of error, and, deeming them to be without merit, and being satisfied that the issues here involved were properly submitted to the jury in a fair and impartial charge, and finding no prejudicial error in the record, the judgment of the trial court is affirmed.

BROOKE, C. J., and STONE, OSTRANDER, BIRD, MOORE, and STEERE, JJ., concurred.

The late Justice MCALVAY took no part in this decision.

BALDWIN v. VILLAGE OF CHESANING.

INTOXICATING LIQUORS—LICENSES—INVALID ORDINANCE—DURESS.

Where plaintiff hotel keeper brought suit to recover an amount paid to defendant village under an invalid ordinance, under threat by defendant's officers that the council would not grant his application for a liquor license unless he complied with the terms of said ordinance, his payment of the money without protest is *held* to be a voluntary payment, and without duress.[1] BROOKE, C. J., and MCALVAY, KUHN, and BIRD, JJ., dissenting.

[1]As to when payment of license fee is made under duress, see note in 22 L. R. A. (N. S.) 873.

As to right to recover back license fee unlawfully exacted under color of authority, see note in 49 L. R. A. (N. S.) 387.

Digitized by Google

Error to Saginaw; Gage, J. Submitted April 13, 1915. (Docket No. 68.) Decided September 28, 1915.

Assumpsit by Thad G. Baldwin against the Village of Chesaning for money paid to defendant under an invalid ordinance. Judgment for defendant on a directed verdict. Plaintiff brings error. Affirmed.

A. Elwood Snow, for appellant.

Charles W. Cheeney and *R. L. Crane*, for appellee.

MOORE, J. The plaintiff is a resident of the village of Chesaning, and has been for 34 years. He was engaged as a saloon keeper in partnership with one Sutter. Their license expired May 1, 1912.

On November 10, 1911, the plaintiff bought the Hotel Central property in the village, consisting of a hotel, barber shop, barroom, and livery, on contract, and agreed to pay therefor the sum of $12,000. On March 6, 1912, the defendant village adopted an ordinance requiring all saloon keepers in said village to pay a license fee of $500. We quote from the brief of appellant:

"In April, 1912, the plaintiff made application for a license to conduct a saloon in his said hotel, and filed his application and bond therefor with the village council. On the evening of April 8, 1912, and before the village council met to pass upon the liquor applications, said meeting night being fixed by statute, the plaintiff was approached by a Mr. Thompson, one of the members of the defendant village council, who said to the plaintiff: 'You had better get busy and pay in your money. If you don't get your money up to the council meeting tonight, you won't get any application; they won't accept your application at all.' The plaintiff was further told at that time by Mr. Thompson that if he waited until May 1st to pay he would not get a license. Mr. Thompson said he had been authorized to say those things by the council and the village attorney. * * *

Digitized by Google

"After the above conversation the plaintiff paid the sum of $500 into the village treasury to obtain such village license in accordance with the village ordinance. The village council met that same night and approved of the plaintiff's application and bond. * * *

"In April, 1913, the plaintiff again made application to said defendant village for a license to conduct a saloon in his said hotel, and filed his application and bond therefor with the village council.

"On the night before the village council met to pass upon liquor applications the president of said defendant village called upon the plaintiff and said: 'Boys, there is no question of a doubt but what you have got to put up your money. The way I feel in regard to it, I am opposed to it. I don't want to see you put up your money, but the council has instructed me to come and tell you you have got to put it up or you won't have any application for license due this next year.'

"At about 5 o'clock in the afternoon of the day the council met the village treasurer called upon the plaintiff, and said: 'Baldwin, this is your last chance. You have either got to put up your money or the boys won't act upon your application. I have been authorized by them to come down and tell you.' * * *

"After the above conversations the plaintiff paid the sum of $500 into the village treasury to obtain such village license in accordance with the village ordinance. The village council met that same night and approved of the plaintiff's application and bond."

It is the claim of the plaintiff that the hotel property was worth the sum of $12,000, and that, if the liquor license was refused the hotel, the property would not be worth to exceed the sum of $5,000, and that to avoid this depreciation in the value of the property the money was paid, and that the action of the council amounted to duress. The circuit judge thought otherwise, and directed a verdict for the defendant. The case is brought here by writ of error.

It was conceded in the court below and is conceded here that the village ordinance was void, so that the only question is: Were the payments of $500 each

Digitized by Google

of the two years made voluntarily? The defendant insists they were, while plaintiff insists that under the situation disclosed by the record the village subjected him to duress. Whether valid or not, the village had an ordinance requiring the fees which plaintiff paid as a condition of doing business. It is fair to assume that counsel for appellant in their statement of facts will call attention to the strongest proof in favor of their clients, and an examination of the record shows they have done so. There is nothing in the record to indicate that the tax was paid under protest, and it may safely be assumed that, if the council failed to approve of the bond and application of the plaintiff for a license when he was legally entitled to it, the courts would grant him relief upon proper application. He did not appeal to the court. As before stated, he paid the fee without protest, and it was not until after he had sold the property that he brings this suit.

The question of duress has been before this court in *Hackley* v. *Headley*, 45 Mich. 569 (8 N. W. 511), and *Knight* v. *Brown*, 137 Mich. 396 (100 N. W. 602), and is there defined. The instant case does not come within the definition. We think the case is governed by *Betts* v. *Village of Reading*, 93 Mich. 77 (52 N. W. 940), and the cases cited therein. See, also, *Eslow* v. *City of Albion*, 153 Mich. 720 (117 N. W. 328, 22 L. R. A. [N. S.] 872).

Judgment is affirmed.

STONE, OSTRANDER, and STEERE, JJ., concurred with MOORE, J.

This case was assigned to the late Justice MCALVAY.

MCALVAY, J. (*dissenting*). Plaintiff brought suit against defendant in an action of assumpsit to recover the sum of $1,000 claimed to have been paid by him to

Digitized by Google

the said defendant involuntarily and under duress. A trial had before the court with a jury resulted in a verdict directed by the court in favor of the defendant and against plaintiff. Upon this verdict a judgment was duly entered. Plaintiff has removed the case to this court for review, assigning errors upon the action of the court in directing a verdict against him.

Plaintiff had been a resident of defendant village for over 30 years, and from May, 1911, up to May 1, 1912, was engaged in business in said village as a retail liquor dealer, in partnership with a man named Sutter. In November, 1911, he purchased upon contract, for the sum of $12,000, "the Hotel Central property," in said village, consisting of the hotel, barber shop, barroom, and livery. Defendant village is incorporated under the laws of this State, and as such exercises all the rights and privileges of incorporated villages and the power and authority to grant applications and approve the bonds of those intending to enter into the business of selling intoxicating liquors at retail within said village, as provided by the statutes of this State.

On March 6, 1912, defendant village adopted an ordinance entitled "An ordinance relative to saloons and saloon keepers," requiring every person desiring to keep a saloon within the village before entering upon such business to apply for and procure a license and to pay the sum of $500 into the village treasury.

Plaintiff, intending to enter into the business of retail dealer in said village from and after May 1, 1912, in April of that year filed his application and bond therefor, as provided by the statute, with the village council for its approval, to conduct a saloon in his said hotel. On the evening of April 8, 1912, the date fixed by law for the village council to meet and pass upon liquor dealers' applications and bonds, and before such meeting, plaintiff was approached by Mr. Thompson,

Digitized by Google

one of the members of the village council, who said he had been authorized by said council to say to him that he could not get out of it; that it would be $500 more this year than last; that if he did not get his money up to the council meeting that night his application would not be granted; that if he waited until May 1st he would not get a license. Plaintiff, on this threat, paid $500 into the village treasury, and received the treasurer's certificate therefor, which was submitted to the council, with his application and bond for a State license, at the council meeting that evening.

The record of the council proceedings shows that all applications and bonds accompanied by the village treasurer's certificate of $500 were approved unanimously by the council, and the application and bond of one person which were not accompanied by the treasurer's certificate for $500 were rejected for that reason. Afterwards plaintiff paid to the county treasurer $500, as required, to carry on the business of a retail liquor dealer for the ensuing year, and received his tax receipt therefor, and entered upon and conducted such business during that year at his hotel.

In April, 1913, plaintiff, desiring to continue such business at the same place, again made application to defendant village council, and filed his application and bond to carry on business as a retail liquor dealer in said village for granting and approval. At this time Dr. Elliot was president of the village. Plaintiff had several conversations with him, the last one on the day fixed by law for the approval of applications and bonds of liquor dealers by the village council, in which the president said to him that he must put up the $500; that the council had instructed him to come and tell plaintiff that he must pay the money or he would not have any application for a license approved that year. Later, on the same day, plaintiff having delayed until 5 o'clock in the evening without making this pay-

Digitized by Google

ment, Mr. Slack, village treasurer, came to him and told him that he must put up the money or the council would not act on his application; also that he was authorized by them to come and tell him. Plaintiff then paid the money. Other witnesses testified as to these demands made upon the plaintiff by members of the council and officers of the defendant village both in 1912 and 1913. Plaintiff at this time owed a large amount upon this hotel property, for which he had agreed to pay $12,000, and further testified that the action of the village in demanding this extra license money crippled him in his business.

The evidence on the part of the plaintiff is undisputed. Defendant village offered no testimony in the case; the verdict in favor of defendant having been directed on motion made in its behalf at the close of plaintiff's case. Upon the trial of the case it was conceded by the defendant village that the ordinance was invalid, and that it had no authority or power to pass it. The contention on the part of the defendant upon the trial was that these payments by plaintiff were voluntary, and therefore he was not entitled to recover.

The only question for the court to consider in this case is whether these payments so admitted to have been made by the plaintiff to the defendant village were voluntary or involuntary. In considering this question we are required to apply the rule so often invoked, in cases where a verdict has been directed, to give the evidence in the case on the part of the appellant its strongest probative force in his favor.

The court and counsel for defendant have relied upon the case of *Betts* v. *Village of Reading*, 93 Mich. 77 (52 N. W. 940), and it is insisted that this case is controlling of the case at bar. If the instant case cannot be distinguished from the *Betts Case*, such contention must be conceded.

In the case we are considering the situation was

Digitized by Google

somewhat peculiar. The common council of defendant village, by the provisions of the general liquor law of this State, was the only body with authority and power to pass upon and approve the applications and bonds of all persons who desired to enter into the business of selling intoxicating liquors at retail within the village of Chesaning. They had passed this ordinance for the purpose of obtaining from every such applicant the sum of $500 to be covered into its treasury for municipal uses, and they have succeeded. Upon each of the instances when these payments were made by plaintiff to defendant upon the day fixed by law when the council was required to act upon saloon applications and liquor bonds, members of the council authorized by it came to plaintiff and made these demands for $500 to be paid to the village, coupled with the threat that, if such sum was not paid forthwith, plaintiff's application and bond would not be approved. On the last of these occasions the performance of this duty was delegated to the president and treasurer of the village. The authority of these members of the council and officers of the village government to make these demands and threats is not only undisputed, but the ratification of their acts and threats and the adoption of what they did in the premises clearly appears from the records of the respective meetings of the common council read into the record in this case. It cannot be said in this case that this was not the act of the village council. When these applications and dealer's bonds were before the council for consideration, it appeared that the application and bond of plaintiff were accompanied by the receipt and certificate of the village treasurer and were approved, because it appeared that the $500 extra had been paid. It further appeared that the application of another person was rejected because it was not accompanied by the treasurer's receipt and certificate for $500. In this

Digitized by Google

respect it is apparent that the instant case is distinguishable from the *Betts Case,* where the court said that none of the officers of the village made any threats of prosecution, and there was only random talk by the village attorney; nor in the *Betts Case* does it appear that threats were made by village officers and their acts ratified by the village council, which was in a position to cripple a man in his business by refusing to approve his application and bond as a retail liquor dealer.

On examination of all of the cases which have been before this court relative to payments of this character to municipal officers, there is no one of them where the facts are similar to those in the instant case. The only thing in common between these cases and the case at bar is that a municipality has unlawfully taken money from a saloon keeper and been allowed to retain it.

It is apparent from the record that the only alternative plaintiff had when this illegal demand was made by members of the council of defendant village was to make the payment, or discontinue business. Such being the case, can it be said that the payments were made voluntarily? These payments made by plaintiff are admittedly illegal exactions, and it is apparent that they were made under apprehension of not being allowed to go on in his business if they were not paid. This being so, the case would come within that class where payments made to prevent apprehended injury to business are held to be involuntary and made under duress. This principle has been recognized by the Federal and several of our best State Supreme Courts.

The case of *Swift Co.* v. *United States,* 111 U. S. 22 (4 Sup. Ct. 244), is cited in *American Brewing Co.* v. *City of St. Louis,* 187 Mo. 367 (86 S. W. 129, 2 Am. & Eng. Ann. Cas. 821, and note), in support of the proposition that payments coerced under duress or compul-

Digitized by Google

sion, though not made in ignorance of the facts, may be recovered. Within this rule are payments of illegal charges or exactions under apprehension on the part of the payers of being injured in their business if the money is not paid. In the reported case cited *supra*, the supreme court of Missouri said:

"It is * * * well settled that payments coerced under duress or compulsion may be recovered. What constitutes duress has been the subject of much discussion. The general rule was first laid down that: 'A payment is not to be regarded as compulsory unless made to emancipate the person or property from an actual and existing duress imposed upon it by the party to whom the money is paid, or to prevent a seizure by a party armed with apparent authority to seize the property. The courts, however, have shown a tendency in the later decisions to extend the doctrine of the earlier common law with regard to compulsory payment, and at the present time, beyond a few * * * principles, they do not attempt to lay down any definite and exact rule of universal application by which to determine whether a payment is voluntary or compulsory.' 22 Am. & Eng. Enc. of Law (2d Ed.), p. 613, and cases cited.

"Among the instances of the relaxation of the strictness of the original rule is the case of payments constrained by business exigencies; that is, payments of illegal charges or exactions under apprehension on the part of the payers of being stopped in their business if the money is not paid."

This view of the case was recognized by the trial court, when it said:

"There are courts in this country that hold that a payment made in the manner in which this one was made by the plaintiff in this case is a payment by compulsion."

We find that the supreme courts of the States of Massachusetts, Illinois, Ohio, Missouri, and other States, have so held. The learned trial judge gave as a reason for not so holding that, in his opinion, there was no evidence to show that the council, as a council,

Digitized by Google

did act. As we have already stated, the record shows without dispute that this was the action of the defendant village of Chesaning. It further shows that it received the money into its treasury without consideration. In our opinion, these payments made under these circumstances were not voluntary payments, and assumpsit will lie to recover the amounts unlawfully paid. Plaintiff was not, as is intimated in the brief of defendant, seeking to recover for damage to his business. He asks simply the return of his money, which defendant village has received unlawfully and without consideration. The court was in error in directing a verdict against him.

The facts in this case are undisputed. We hold that these payments were involuntary payments. There is no defense which can be interposed to defeat plaintiff's claim.

Therefore the judgment of the circuit court is reversed, and a new trial ordered.

BROOKE, C. J., and KUHN, and BIRD, JJ. The foregoing opinion was prepared by the late Justice MCALVAY. We are satisfied with his conclusions.

HAENER v. McKENZIE.

1. FRAUD—PLEADING—PROOF OF MISREPRESENTATIONS.
   In an action to recover for alleged fraudulent representations in the sale of land, plaintiff is entitled to recover upon proof of any material fraudulent representations charged, although he may have charged other acts which were not proven.

Digitized by Google

2. SAME—MATERIAL FACTS—SELLER'S TALK.
Representations falsely made by defendant that the land was high and dry and good agricultural land, without mire, swamp, or boggy portions, were material facts and not mere seller's talk, which, relied upon by plaintiff and becoming an inducing cause of the sale, render defendant liable.

3. SAME—QUESTION FOR JURY.
As to whether such representations were made as charged, *held*, to be for the jury.

4. SAME—PRINCIPAL AND AGENT.
An action will lie against defendant for a fraud knowingly committed whether he acted as principal or as agent of another.

5. DAMAGES—FRAUD—RESCISSION OF CONTRACT—INSTRUCTIONS—MEASURE OF DAMAGES.
In an action to recover for alleged fraudulent representations in the sale of land, it was error for the court to charge the jury that the measure of damages was the amount of money paid by the plaintiff, with interest, where there was no evidence that the contract was ever rescinded by the plaintiff and tendered back to defendant; under the pleading and evidence the measure of damages was the difference between the value of the land as represented and what it was actually worth.

Error to Wayne; Hosmer, J. Submitted January 26, 1915. (Docket No. 50.) Decided September 28, 1915.

Case by Arnold Haener against F. W. McKenzie for fraudulent representations in the sale of land. Judgment for plaintiff. Defendant brings error. Reversed.

Moore & Moore, for appellant.

Frederick Miller and *John W. Bennett*, for appellee.

STONE, J. This case is here upon a writ of error to the Wayne circuit court to review a judgment for the plaintiff for $460 damages, in an action on the case based upon alleged false and fraudulent representations made by the defendant to the plaintiff in the

Digitized by Google

making of a contract for the purchase by the latter of 40 acres of land from the defendant, as agent of the Magnolia Springs Land Company, an Alabama corporation. The land is located in Baldwin county, Ala. The declaration, in substance, alleges that on, to wit, March 1, 1912, the defendant, representing himself to be the agent of said defendant company, called upon the plaintiff in the city of Detroit and stated and represented to the latter that he (said defendant) had the sale of some very fine farming land in the State of Alabama which he was selling for said company; that the land was very choice stump land, consisting of a very fine black loam with a clay subsoil; that the said land was high and dry, and ideal for farming purposes; that the land was absolutely free and clear of underbrush, and positively worth $50 an acre; and that all of the land was good, substantial, and fine agricultural land, without any mire or boggy portion, and such as to guarantee to the purchaser working the same a big return on the money invested.

It is further averred that the defendant then and there represented that the climatic conditions were perfect, and that severe storms were unknown, and that therefore said land was never inundated by reason thereof; that said land was of such a fertile nature that 200 bushels of sweet potatoes could be raised per acre, which potatoes would sell for at least 40 cents per bushel, and that said land and climate were perfect for the raising of Irish potatoes; that all the land on the 40 acres that he was offering to sell to the plaintiff was good agricultural land, without any mire or boggy portion, and free from vermin and poisonous snakes; that all of said representations were untrue in substance and in fact, and were wilfully, wantonly, wickedly, and maliciously made by said defendant, contriving and fraudulently intending to deceive, defraud, and injure the plaintiff, and by means thereof to induce

Digitized by Google

the plaintiff to purchase the said property, and advance and deliver to said defendant $400 as part payment thereof.

It is further averred that, relying on all of the aforesaid statements, representations, and pretenses, and believing the same to be true, the plaintiff on, to wit, March 14, 1912, agreed to purchase a certain 40-acre parcel of said land from the Magnolia Springs Land Company for a consideration of $1,600, and paid the defendant $400 in cash, and received a written land contract therefor signed by said company, which contract was offered in evidence by the plaintiff and appears in the record.

The declaration further avers that subsequently, and on the 5th day of September, 1912, the plaintiff moved his family, consisting of his wife and two children, to Alabama for the purpose of taking up his residence on said land; that upon investigation he found that instead of the land being black loam, with a clay subsoil, about 5 acres were covered with marsh and rank underbrush teeming with poisonous snakes and reptiles, and which no possible effort could reclaim for agricultural purposes, and that to penetrate said underbrush was next to impossible, not alone on account of the density of the underbrush and marsh, but also "the jeopardy of life in such a venture into this snake-infested region"; that, in addition to said 5 acres, there were 20 acres of said land that was covered with a great swamp, being a black mire, totally unfit for agriculture "or any other purpose which might be effected by the hand of man for his sustenance"; that the remaining 15 acres were high and dry, but so impregnated with iron ore as to be wholly unfit for the purposes for which the defendant had represented the land to be suitable; that the said climate was so infested with sand flies, bugs, and vermin as to be entirely unfit for habitation; that the cultivation of Irish potatoes was impossible, be-

Digitized by Google

cause of climatic condition, and that the representation as to the quantity of sweet potatoes that could be raised per acre was absolutely false; that said land, instead of being worth $40 an acre, was, in fact, worth only $10 an acre.

The declaration concludes as follows:

"Plaintiff further avers that after a thorough examination of the land and conditions, and upon becoming aware of the falsity of the aforesaid statements, representations, actions, and conduct of said defendant, the said plaintiff returned to the city of Detroit, and did, on the 9th day of October, A. D. 1912, and on divers subsequent dates, demand of defendant that he return forthwith to the plaintiff the aforesaid sum of money paid and delivered at the time of the execution of the said land contract, but said defendant did wickedly, wantonly, wrongfully, and maliciously neglect and refuse to return the aforesaid sum of money to plaintiff.

"Plaintiff further avers that by means and in consequence of the aforesaid false and fraudulent representations, statements, and pretenses, and believing the same to be true, and not knowing to the contrary, he was induced by means thereof to pay and deliver to said defendant the aforesaid sum of money, and thereby plaintiff lost and was wholly deprived of said sum of money, and plaintiff became, and was, and ever since has been, unable to secure the return, or enforce payment of said sum of money, or any part thereof, greatly to plaintiff's financial loss, injury, and damage."

Upon the trial the testimony took a wide range, and there was evidence tending to support the declaration. There was, however, a sharp conflict in the evidence as to the fertility of the land and its suitableness as farming land to raise the crops as represented. Some of defendant's witnesses, however, testified that from 15 to 18 acres of the 40 were not high and dry, but constituted what was described as a swale, which ran through the center of the land, and would have to be drained to make it suitable for cultivation, and also 2 or 3 acres of creek head, covered with underbrush,

Digitized by Google

and which was low and unsuitable for cultivation. The defendant upon cross-examination testified, in part, as follows:

"*Q.* You had seen the property. had you?
"*A.* I had seen it.
"*Q.* You had seen this particular farm that was sold to him—farm No. 1?
"*A.* I had seen it; yes, in a general way.
"*Q.* I am speaking of this 40; did you tell him that this 40 was a high and dry 40?
"*A.* I do not know whether I did or not. I told him it was a good-looking 40.
"*Q.* Would you say that you did not?
"*A.* I would not say.
"*Q.* Did you tell him that every foot of this 40 could be cultivated?
"*A.* I do not remember whether I did or not.
"*Q.* If you did say that, was that true?
"*A.* Yes; it would be true, because every foot of that land can be worked. Every foot of it can be worked, if properly drained.
"*Q.* Did you tell him that he would have to drain 15 acres of this land before he could use it?
"*A.* I did not.
"*Q.* Now, if you had known that this was the condition of the land as shown by the surveyor, and that there were 15 to 18 acres that had to be drained before it could be cultivated, would you have told him that every foot of it could be cultivated?
"*A.* Not if I knew it beforehand.
"*Q.* You did not know it?
"*A.* I did not.
"*Q.* And it is a fact now?
"*A.* Well, that is according to the surveyors and according to that plat.
"*Q.* The surveyor says that there was 15 acres that would have to be tile drained, or drained before it could be cultivated?
"*A.* Yes, sir.
"*Q.* That is true, isn't it?
"*A.* Well, to a certain extent it is true."

There were some negotiations by telegraph looking

Digitized by Google

toward an exchange of the 40 acres described in the contract, for another 40, and an unsigned contract was sent to plaintiff by defendant for the former to sign. It was never signed, nothing came of it, and it was returned unsigned to defendant by plaintiff upon his return to Detroit. It was undisputed, and the defendant testified, that when plaintiff demanded the money back which he had paid, the defendant told him that he (defendant) did not have the money, but that the money had been sent to the company.

In submitting the case to the jury, the trial court charged them in part as follows:

"Now, gentlemen, you have heard the testimony of the various witnesses who have been called, and it is a question for you whether there was a misrepresentation made of a material matter with reference to the land in question, because unquestionably if there was a misrepresentation, as claimed by the plaintiff in this case, he would be entitled to tender back his contract to the agent from whom he had got it, and to demand, of course, the money back, and it is for you to say, having heard all of the testimony in this case, where the truth lies. * * *

"I have been asked to charge you that because Mr. McKenzie was the agent, and did not receive the money, that he would not be entitled to recover, but at the same time, gentlemen of the jury, Mr. McKenzie is bound personally by his own representations, and was the only party in the State of Michigan with whom the plaintiff ever came in contact, and I do not think the mere fact that he had turned over the money to the company would preclude the plaintiff in this case from prosecuting this action. * * *

"Now, if the plaintiff is entitled to recover, he is entitled to recover the sum of $400, and interest from March, 1912, down to the present time, at the rate of 5 per cent. per annum."

The defendant has brought the case here assigning many errors, some of which we do not deem it neces-

Digitized by Google

sary to specifically consider. The following claims are covered by assignments of error:

(1) Neither Mr. McKenzie, the agent, nor the land company, the principal, was liable for all or any of the representations alleged to have been made.

(2) Defendant was the agent, and, having paid over the money to his principal, is not liable for a return of the money.

(3) The declaration does not allege, nor does the evidence show, that the contract was ever rescinded, or ever tendered back to the defendant; therefore in no event could the defendant be liable for the purchase money paid, either under the declaration or under the evidence.

1. We have held that, if any material fraudulent representation is charged which resulted in the injury to the plaintiff complained of, he is entitled, upon the proof of the same, to recover, although the declaration may have charged other acts which were not proven. *Wegner* v. *Herkimer*, 167 Mich. 587-594 (133 N. W. 623), and cases there cited. As we also said in that case, we cannot agree with appellant's counsel that all of the representations testified to were "seller's talk, pure and simple." Recognizing the rule that a seller has a right to praise his property and to give his opinion concerning it, we think that the rule cannot be extended to embrace false representations of alleged facts in a case, which may be and were relied upon by the purchaser, and became an inducing cause of the transaction. Manifestly, the representation claimed that the land was high and dry, and good agricultural land, without mire, swamp, or boggy portions, was a material representation of a fact within our numerous decisions. See collection of our decisions in the above-cited case on page 595 of 167 Mich. (133 N. W. 623); *Hall* v. *Car Co.*, 168 Mich. 634-641 (135 N. W. 118); *Allen* v. *Talbot*, 170 Mich. 664-668 (137 N. W. 97); *Pratt* v. *Circuit Judge*, 177 Mich. 558, 562

Digitized by Google

(143 N. W. 890); *Merlau* v. *Circuit Judge*, 180 Mich. 393 (147 N. W. 503).

We do not think the trial court erred in submitting the question as to the alleged fraudulent representations to the jury.

2. While we agree with appellant's counsel that there could not be a recovery here of the money paid by plaintiff in the contract, yet we are of the opinion that an action will lie against an agent for a fraud knowingly committed in behalf of a principal, even though the agent receives no personal benefit from the fraud. All persons who are active in defrauding others are liable for what they do, whether they act in one capacity or another. *Weber* v. *Weber*, 47 Mich. 569 (11 N. W. 389); *Angell* v. *Loomis*, 97 Mich. 5 (55 N. W. 1008); *Stoney Creek Woolen Co.* v. *Smalley*, 111 Mich. 321 (69 N. W. 722).

3. An examination of this record discloses the fact that the declaration does not allege, nor does the evidence show, that the contract was rescinded by the plaintiff, or that he ever tendered it back to the defendant. On the other hand, the plaintiff had it in his possession and offered it in evidence upon the trial. From aught that appears in this record, the plaintiff may still be claiming rights under the contract. The trial court seems, in its charge, to have recognized the necessity of a rescission, and yet a recovery was permitted without it. We are constrained to hold that it was reversible error for the court to charge the jury that the measure of damages in the case was the amount of money paid by the plaintiff, with interest thereon. In no event could that be the measure of damages under the declaration and the evidence. It is an elementary rule of law that, in order to recover the purchase price, the plaintiff must allege and prove a tender back, or an offer to tender back; in other words, he must first place the other party in *statu quo*.

Digitized by Google

Galvin v. *O'Brien*, 96 Mich. 483 (56 N. W. 85), and cases there cited.

The distinction between suing for damages in affirmance of a contract and suing to recover back the money paid is pointed out in *Patterson* v. *Kasper*, 182 Mich. 281 (148 N. W. 690). We are not here deciding that there could be no recovery in this case, but we are deciding that under the pleadings and evidence the measure of damages would not be the money paid and the interest thereon. The measure of damages in such a case, where there is no rescission, is the difference between the value of the premises had they been as represented and what they were actually worth. *Wegner* v. *Herkimer*, 167 Mich. 593 (133 N. W. 623).

We find no other reversible error in the record; but, for the errors pointed out, the judgment below is reversed, and a new trial granted.

BROOKE, C. J., and KUHN, OSTRANDER, BIRD, MOORE, and STEERE, JJ., concurred.

This case was originally assigned to the late Justice MCALVAY.

PEOPLE *v.* ATWOOD.

1. WITNESSES — PRIVILEGED COMMUNICATIONS — PROBATE JUDGES — STATUTES—CRIMINAL LAW—ABORTION.

   In a prosecution for using an instrument with intent to produce a miscarriage, where the court, upon request of the prosecutor, entered orders for the probate judge and clerk to produce the records and testify to the marriage of respondent and deceased, celebrated by said judge in

Digitized by Google

conformity with Act No. 180, Pub. Acts 1897, as amended by Act No. 232, Pub. Acts 1899, which provide that all knowledge of any facts coming to the judge or his deputies shall be privileged communications, and that such records shall be open to inspection only upon written order of the circuit judge, such orders did not authorize either officer to state communications and facts received in confidence and privileged by the law.

2. EVIDENCE—REVERSIBLE ERROR—APPEAL AND ERROR.
Where the facts shown by the record were otherwise proved, or admitted by respondent, its introduction was not reversible error.

3. SAME—PROBATE JUDGE—PRIVILEGED COMMUNICATIONS.
Where the probate clerk and judge testified as to conversations with, and statements of, respondent before the marriage, their evidence was not confined to the subjects indicated in the orders, and was prejudicial, notwithstanding that said marriage was admitted and otherwise proved, and that respondent admitted he was the father of the child, and was at the time unwilling to marry its mother.

4. SAME — PRIVILEGED COMMUNICATIONS — WAIVER — OBJECTION — APPEAL AND ERROR.
Where no proper objection was made in the court below that respondent had a privilege which was being violated by the admission of such testimony, and the only objection made in this court is that such orders could not lawfully be made upon the application of the prosecuting attorney, respondent is *held* to have waived the privilege.

5. CRIMINAL LAW—ABORTION—EVIDENCE—HEARSAY—INFERENCES.
Where the people had proved that deceased was pregnant, that an abortion had been committed, and that it caused her death, and where the relations of respondent and deceased supported an inference that he knew her condition, that she would not have an operation performed without his knowledge, and that he was cognizant of the crime, evidence that on the night she left her home and remained away she seemed in good health and spirits, and said that she was going to meet respondent, was admissible as verbal acts accompanying her going away, and whether they truthfully explained her conduct and purpose was for the jury.

Digitized by Google

Exceptions before sentence from Ottawa; Cross, J. Submitted April 22, 1915. (Docket No. 117.) Decided September 28, 1915. Rehearing denied December 22, 1915.

Morris Atwood was convicted of using an instrument with intent to procure a miscarriage. Affirmed.

Louis H. Osterhous, Prosecuting Attorney, for the people.

Smedley & Linsey, for respondent.

OSTRANDER, J. Respondent was, with another, charged with, and upon his separate trial was convicted of, the offense of employing an instrument, or instruments, name or names and exact nature thereof unknown, and other means, the exact nature of which is unknown, in and upon the body of Zelma Atwood, she being pregnant, etc., etc., with intent to procure a miscarriage, in consequence of which the said Zelma Atwood died, on or about October 21, 1913. The crime is alleged to have been committed on or about October 21, 1913, at the township of Blendon, in Ottawa county. A motion for a new trial was denied. The motion was based in part upon alleged newly discovered evidence. Many exceptions were taken during the trial. Those relied upon are stated in the brief for respondent as follows:

"(1) Admission of evidence:

"(*a*) Court erred in allowing witnesses Guyola Hammond, Ralph Lowing, and Eliza Lowing, over objection and exception of respondent's counsel, to testify as to what Zelma Atwood said on the evening she left, and refusing to strike out this testimony upon motion.

"(*b*) Court erred in allowing witness Agnes Frieswyck, over objection and exception of respondent's counsel, to testify as to what Zelma Atwood said about going for a walk with Morris, and that Morris was out waiting for her.

Digitized by Google

"(c) Court erred in permitting witnesses George Norcross, probate clerk, and Clark Higbee, probate judge, over objection and exception of respondent's counsel, to testify in relation to the marriage of respondent and Zelma Hammond, and what was said and done by these parties on that occasion, and the admission in evidence of the files of probate court with reference to this marriage, and the refusal to strike out this evidence on motion.

"(d) Court erred in allowing respondent, over the objection and exception of his counsel, to answer the question as to the parentage of the child born in 1912, and what took place at the probate court at the time of the marriage.

"(2) Motion to direct verdict:

"(a) It was error for the court not to direct a verdict of not guilty for respondent for the reasons stated in the motion.

"(3) Errors in the charge:

"(a) Respondent's first request to charge directing the jury to return a verdict of not guilty should have been given.

"(4) Argument of prosecuting attorney:

"(a) It was error for the prosecuting attorney to make the argument with reference to the *Bert Tibbits Case*, and the court to allow the same to stand over the objection and exception of respondent's counsel.

"(5) Motion for new trial should have been granted:

"(a) Because the verdict was against the great weight of evidence.

"(b) Because of newly discovered evidence.

"(c) Because the people failed to prove the respondent guilty beyond a reasonable doubt as a matter of law.

"(d) Because respondent is innocent of the charge made against him."

Zelma Atwood was 33 years old. She had for some years been employed as a domestic in the city of Grand Rapids, but from some time in April, 1912, had lived with her mother, Eliza Lowing, in Blendon township aforesaid. She had two brothers and two married sisters, a daughter, and other relatives. Leaving home

Digitized by Google

on Tuesday, October 21, 1913, to call upon a married daughter, Mrs. Lowing, at the request of Zelma, took with her and placed in the Atwood mail box an envelope addressed to respondent. Returning in the evening, she found Zelma there, who left the house at about 8:30 o'clock with some dishes which she said she would carry to a neighbor, a Mrs. Frieswyck. She was dressed in a brown suit. She went to Mrs. Frieswyck's house at a time fixed as between 8 and 8:30 o'clock, stayed a very few moments—six or eight—and went away. No person has testified to having thereafter seen her alive.

The Atwood house is about three-fourths of a mile from the Lowing house. Across the road from it, and south, is a small wood lot. The father and mother of respondent were absent upon a visit to New York. Respondent and a brother—corespondent in the information—were living at the Atwood home alone. Nothing was heard from Zelma by her relatives on Wednesday or on Thursday, and on Friday her body was found by Frank Atwood in the wood lot, hanging to a sapling by a rope tied short around her neck. Her back was towards the tree, her feet some 5 inches from the ground, a block of stove wood near her feet. She wore a tight-fitting hat, a suit of brown, a coat, and skirt and waist under the coat. She had on a corset, corset waist, underclothing, shoes and stockings, black cotton gloves. The dress, or waist, opened at the back, and was fastened with hooks and eyes. In the front there were hooks and eyes fastening the upper to the lower part of the waist, and on the right side it was partly open, some fastenings were gone, and a pocketbook or small hand bag was found inside the waist. She had on no rubbers, and her shoes were clean. In the hand bag were three handkerchiefs, one soiled, a bow of velvet and pin, a belt like the dress, a comb, drinking cup, button hook, toothbrush, paper, and en-

Digitized by Google

velopes. There was also a letter in an envelope, addressed to her mother, sealed and stamped. It was dated October 21st, and read:

"Dear mother and all: I am off for good and you need not look for me as I will not be around here. You will not find [that is spelled f-i-n-e] me, but don't blame Morris. That trouble we had a year or so, I am in the same fix now with the same feller as before. Morris is a straight feller, you cannot blame him that I take this course. Ever, daughter ZELMA."

It is conceded that it was written by Zelma. The outer clothing was somewhat moist; the underclothing was orderly, unsoiled, and dry. It had rained Tuesday night, and during Wednesday afternoon there had been a fall of rain, snow, and sleet. The weather cleared during that afternoon.

The testimony tended to prove that she had not died of strangulation, but that the body had been hung up after death; that she had been pregnant and had aborted. The physical examination did not disclose whether an abortion was produced by drugs, instruments, or other means, nor whether it was performed by herself or another.

It is the theory of the people that a medical man or midwife performed a criminal operation upon Zelma at the Atwood home, by procurement of respondent; that death ensued from shock or from loss of blood resulting from the operation; that her body was concealed for some time, probably until Thursday night or Friday morning, when it was taken by respondent and his brother to the timber lot and hung to the tree where and as it was found. The motive for performing or securing performance of an abortion is found in the facts that respondent and Zelma were husband and wife, although this was not known to respondent's family, nor generally; that he was responsible for her condition and had been the father of a child previously

Digitized by Google

born, that he did not wish, at least not presently, to acknowledge the long-concealed relationship, and if it was further concealed he would appear to the community to be the father of a bastard. Opportunity is found in the fact that his father and mother were absent from home, and he and his brother only occupied the house from Tuesday night until after the body was discovered. Testimony was introduced which, with the inferences drawn therefrom by the people, sustain this theory. Respondent denied having seen Zelma Tuesday night or thereafter and all knowledge of the circumstances which led to her death and the disposition of her body. The testimony of respondent's brother generally supports that of respondent. With this statement we may proceed to examine the exceptions relied upon.

1. Before the people's case was closed, testimony was given by several witnesses to the effect that they did not know until after the body was discovered that respondent and Zelma were married. Others had testified, without objection, that they knew they were married. Her mother had testified that Zelma's first husband was named Hammond, by whom before marriage she became pregnant, who married her after he had been arrested, and then deserted her. His child, a girl, was a witness at the trial. Afterwards, in March, 1909, Zelma had another baby, by what father is not disclosed. A third child was born in March, 1912, at the Michigan Home for Girls. Later it was given away, or "bound out." In Zelma's family it was understood that respondent was father of the last child.

To prove the marriage of respondent and Zelma, the people called the probate clerk, the probate judge, and produced certain files and records of the probate office. Two papers from the files, an application for license to marry, and a marriage license and certificate, being offered in evidence, were objected to, "on the grounds

Digitized by Google

that we admit Morris married her, and therefore it is not necessary, and I don't think the contents of those affidavits ought to be read into the record as long as we admit that." They were objected to as incompetent. The prosecuting attorney did not read the affidavit. The papers were admitted for the purpose of establishing the fact of a marriage, and from them the prosecuting attorney informed the jury as follows:

"The application is made under Act No. 180 of the Laws of Michigan, as amended by the Public Acts of 1892, Act No. 232. The application for the license is signed by Morris Atwood, and was subscribed and sworn to by him on April 19, 1912, before Clark E. Higbee, judge of probate, giving the name of the groom as Morris Atwood, age 37, residence, Blendon township, and the name of the bride as Zelma Hammond, age 33, residence, Grand Rapids, Mich. The marriage license and certificate included a copy of Atwood's affidavit and application for the license, the order of the judge of probate, made upon the same day that the marriage was performed, and designating John T. Husted, a minister of the gospel, of Grand Rapids, Mich., to perform the marriage ceremony, and includes this certificate of marriage: 'I hereby certify that Morris Atwood and Zelma Hammond were joined in marriage by me at Grand Rapids, Kent county, Mich., on the 19th day of April, 1912, in the presence of George S. Norcross, of Grand Rapids, and John T. Hayes, of Grand Rapids, as witnesses. J. T. Husted, Pastor of Wallin Congregational Church.'"

The articles of adoption of the child were offered and received over objection to prove the respondent's acknowledgment that he was father of the child.

To the testimony of the probate clerk and judge, in which were rehearsed conversations with and statements of respondent before the marriage, various objections were made. One was the general one that it was incompetent; another, stated with the motion to strike out the testimony of the clerk, was that the law does not permit him to divulge such matters except

Digitized by Google

upon order of the court. An order had been made upon the petition of the prosecuting attorney applying to the probate judge only. The court, upon request of the prosecuting attorney, after the objection aforesaid was made, permitted an order to be entered applying to both the judge and clerk. Respondent excepted. The order was entered. To the testimony of the probate judge, the objection was:

"Incompetent, contrary to public policy. These people are married now, husband and wife, and any conversation in regard to the sexual intercourse before or after marriage is incompetent."

Act No. 180, Public Acts of 1897, is entitled "An act to provide for the protection of the reputation and good name of certain persons." As amended by Act No. 232, Pub. Acts 1899, it empowers the probate judge of each county, and makes it his duty, to issue, without publicity, a marriage license and to celebrate marriage in certain cases. It provides that all knowledge of any facts coming to the judge or his deputies shall be deemed to be privileged communications, and any violation of confidence a misdemeanor.

"Such file in the probate court, and the duplicate and record thereof in the office of the secretary of State, shall be open to inspection only upon the written order of the judge of any circuit or the Supreme Court of this State, and only for such use as is designated in such order. Such order shall be made only upon the written request of the person or persons who were so married, or when necessary to the protection of property rights arising from or affected by such marriage." Section 3.

Assuming that the license and marriage might have been proved by the record, upon the order of the court, the order could properly go no further. Neither of the orders entered purports to authorize either officer to state communications and facts received in confidence and privileged by the law.

Digitized by Google

It is said that the marriage was admitted and otherwise proved, and the fact that respondent was the father of the child and was at the time unwilling to marry its mother was testified to by him. Consequently, it is argued, the error, if one was committed, was harmless. The testimony was not confined to the indicated subjects, and was, beyond question, prejudicial to respondent.

In this court counsel for respondent urge that the orders referred to could not be lawfully made upon the application of the prosecuting attorney. No such point was made at the trial. Indeed, one of the objections made was based upon the fact that as to the probate clerk no order had been entered. And it is not asserted in this court, and was not in the court below, that respondent had a privilege which was being violated. What the record showed was otherwise proved or admitted, and therefore its introduction was not reversible error. The testimony of the witnesses as to matters not appearing of record, as to admissions and statements made by respondent, would undoubtedly have been excluded upon the objection that whatever respondent had said was privileged. No such objection was made, nor is it made in this court. If the privilege is his, respondent may waive it. Upon this branch of the case the exception must be overruled.

2. The people's witnesses, Guyola Hammond, Ralph and Elgie Lowing, Agnes Frieswyck, and Mrs. Lowing, were permitted to state what deceased said on the evening she was last seen by them alive. The testimony of Guyola Hammond, daughter of deceased (and that of the Lowing boys was substantially the same), was:

"*Q.* What did you hear your mother say, if anything, * * * about where she was going and what she was going to do? * * *

"*The Court:* Fix the time.

Digitized by Google

"*Q.* As near as you can tell, about what time was it when you heard them talking?

"*A.* About supper time; I don't know just what time it was. I didn't notice. My grandma had been away, and she didn't come home until almost dark. I couldn't tell just what time it was.

"*The Court:* How long after that did she leave?

"*A.* I don't just remember. I think she left about 8 or a little after. I don't know how long it was before they were talking. * * * I heard her say something about going to Grand Rapids, and that she was going to be married.

"*Q.* Just what did she say about it—about when and where she was going and who she was going with, and all about it?

"*A.* I don't just remember all she said. I know something about she was going to Grand Rapids to be married, is all I remember.

"*Q.* Did she say when she was going and who she was going with?

"*A.* I think I understood her to say she was going with Morris.

"*Q.* And when?

"*A.* That night; they were going to Grand Rapids. * * * My grandma told her she didn't want her to go alone. She said not—she was not; that Morris was going with her."

Mrs. Lowing testified:

"*Q.* What, if anything, did Zelma say that evening about where she was going and what she was going to do?

"*A.* She told me she was going to Grand Rapids. * * *

"*Q.* Who did she say she was going to Grand Rapids with, and what did she say she was going to Grand Rapids for? * * *

"*A.* She said she was going with Morris Atwood.

"*Q.* For what?

"*A.* They were going to be married.

"*Q.* And at what time and place was, or did she say, she was to meet Morris?

"*A.* He was to meet her at 8 o'clock.

"*Q.* Where?

Digitized by Google

"*A.* At the house.

"*Q.* At your house?

"*A.* Yes, sir. When she came downstairs she was dressed in a brown suit. She did not seem to be excited or nervous that evening. She was quite jolly and jovial, the same as usual. Morris did not come to the house to meet her. She left the house about half past 8, as near as I can remember. * * *

"*Q.* Just tell us what she said about the time she left the house?

"*A.* She said she would go to Mrs. Frieswyck's, and if she met Morris—if she didn't meet Morris, she would be right back, but 'if I do meet him, you will know we have gone.' Mrs. Frieswyck lives between our house and the Atwood house."

Mrs. Frieswyck testified:

"I remember Zelma Hammond or Zelma Atwood coming to my house on Tuesday evening of October 21st. It was between 8 and half-past. Zelma brought some dishes back. She came into the kitchen, where I was busy. One side of the kitchen is facing the road. Zelma had on what I might call a brown or tan suit. She had on a blue velvet cap and some ragged gloves. She had on some button shoes. She stayed perhaps six or eight minutes. I don't know just exactly; not very long I know. * * *

"*Q.* What did she say about where she was going and whom she was going to see?

"*A.* She said she was going for a walk with Morris.

"*Q.* Did she say where Morris was?

"*A.* She said he was out waiting for her."

The objection made to receiving the testimony of Guyola Hammond was that it was—

"incompetent and irrelevant. The respondent was not present. He cannot be bound by it."

Before the question was finally answered, the objection was repeated in the following language:

"We object to the question and answer for the reason that it is hearsay, and that it is purely narrative statement, and for the further reason that the prosecutor

Digitized by Google

knows that no statement that this witness is about to make can be connected up with the respondent and that the respondent was not present. * * * It appears from the examination taken before the justice of the peace that the statement about to be made by the witness cannot be connected up with the respondent in any way, and that is known to the court and also known to the prosecuting attorney at the present time."

To the testimony of Mrs. Frieswyck the objection first above noted was entered. To the testimony of Ralph Lowing the objection made was:

"I object to that as incompetent, for the reason, as stated before, that the respondent was not present, and that the prosecutor does not propose to make any connection between the conversation and anything that the respondent did; that is, he does not propose to show that Morris did go with her to Grand Rapids to get married or anything else, and he does not propose to show that Morris was seen with her that night, and therefore it is incompetent, and not a connected story."

To the testimony of Elgie Lowing and Mrs. Lowing the objection first above stated was made. I find in the record no statement of the purpose for which the testimony was offered, no ruling upon the subject of its limitations or effect. No request to charge concerning its legitimate purpose appears to have been preferred, and no reference to it is made in the charge. What use was made of it in argument we cannot know. Generally, the prosecuting attorney says of this testimony:

"There surely can be no question but that this testimony was admissible for the purposes for which it was offered and the purposes for which it was used. These purposes were not to show that deceased actually went to Grand Rapids to be married, or that she was intending and planning to have an abortion performed, or that an abortion was performed. The declarations in question were not proof of any one of these three things, and no one but respondent's counsel ever sug-

Digitized by Google

gested that they might be so considered, or were so considered. The testimony was offered, admitted, and used as evidence of verbal acts explanatory of and characterizing the act of deceased in going away from home, as original evidence of material facts showing the state of mind and intention of deceased, and as part of the *res gestæ*. So offered, received, and considered, these declarations of deceased were competent evidence, and the court did not err in admitting proof of them.

"The state of mind and intention of deceased were especially important in this case, because it is one of the claims of respondent's counsel that she had herself planned and arranged for the abortion before leaving her home. And counsel admit the testimony in question to have been competent for the purpose of showing her intent and purpose in leaving."

And he cites *People* v. *McDowell*, 63 Mich. 229 (30 N. W. 68); *People* v. *Fritch*, 170 Mich. 258 (136 N. W. 493); *Martin* v. *State*, 77 Ala. 1; *Harris* v. *State*, 96 Ala. 24 (11 South. 255); *Thomas* v. *State*, 67 Ga. 460; *Warrick* v. *State*, 125 Ga. 133 (53 S. E. 1027); *State* v. *Peffers*, 80 Iowa, 580 (46 N. W. 662); *State* v. *Winner*, 17 Kan. 298; *Commonwealth* v. *Trefethen*, 157 Mass. 180 (31 N. E. 961, 24 L. R. A. 235); *State* v. *Hayward*, 62 Minn. 474 (65 N. W. 63); *State* v. *Thompson*, 132 Mo. 301, 321 (34 S. W. 31); *Id.*, 141 Mo. 408 (42 S. W. 949); *Hunter* v. *State*, 40 N. J. Law, 495; *Kirby* v. *State*, 7 Yerg. (Tenn.) 259; *State* v. *Mortensen*, 26 Utah, 312 (73 Pac. 562, 633); *State* v. *Goodrich*, 19 Vt. 116 (47 Am. Dec. 676); *State* v. *Howard*, 32 Vt. 380; *Cluverius* v. *Commonwealth*, 81 Va. 787; *Tilley* v. *Commonwealth*, 89 Va. 136 (15 S. E. 526); *State* v. *Power*, 24 Wash. 34 (63 Pac. 1112, 63 L. R. A. 902); *State* v. *Dickinson*, 41 Wis. 299; *United States* v. *Nardello*, 15 D. C. (4 Mackey) 503.

For respondent the proposition is advanced that:

"Before declarations of deceased made under these circumstances can be admitted as competent evidence,

Digitized by Google

it must appear: *First,* that the thing she said she was going to do was actually done; *second,* the respondent must be connected up with the statement by some other proof; *third,* the declarations cannot relate to any understanding or arrangement deceased had with respondent."

Again, with reference to the testimony of Mrs. Frieswyck, it is said:

"We submit this testimony was clearly incompetent because it was hearsay; and it was clearly prejudicial because the jury was allowed to use this for the purpose of connecting respondent with the disappearance of deceased. The process of reasoning on the part of the jury could only be this: Zelma said she was going for a walk with Morris; that Morris was waiting for her. We conclude Zelma did go for a walk with Morris. Morris was out waiting for Zelma, and therefore Morris committed the abortion because he took a walk with Zelma and had the opportunity. * * * There is a further reason why this testimony was incompetent. The alleged declarations made by deceased were made by the wife of respondent. If living, she would not be a competent witness against him without his consent."

Having proven by other testimony that Zelma Atwood was at the time pregnant, that an abortion had been committed, that it caused her death, the people were bound to prove that respondent was in some way responsible for the crime and for its result. That Zelma left her home on Tuesday evening and remained away, and that when going away she seemed in good health and good spirits, were relevant facts. But in trying to reconstruct for the tribunal of inquiry the *res gestæ,* the things which occurred from the time she left home until her body was found, it was necessary, to some extent, to employ inferences. No witness could be produced who saw the alleged crime committed or the steps taken to dispose of the baby; none who saw respondent with her or who knew where she

Digitized by Google

went. The rope, which came from respondent's barn, the piece of wood at her feet when she was discovered, the place where the body was found, and the fact that it was discovered by the brother of the respondent soon after knowledge had come that the authorities would probably conduct, or had begun, an inquiry, were circumstances tending to support the inference that the crime was committed in the immediate neighborhood. The relations of respondent and Zelma supporting an inference that he knew her condition and that she would not likely submit to having an operation performed without his knowledge, the manner in which the rope which suspended her body was tied, the apparent indifference of respondent when informed of the disappearance of Zelma and asked to aid in finding her, are all circumstances supporting an inference that respondent was at least cognizant of the crime. We are of opinion that it was competent to prove her utterances made when she was leaving home, and the neighbor's home, on Tuesday evening, not as evidence of the fact that she met respondent, but as evidence of her intention to meet him and explanatory of her purpose in going away. Her utterances were in the nature of verbal acts accompanying the act of going away. Whether they truthfully explained her conduct and purpose was a question for the jury. The testimony being competent, the exceptions taken to the ruling admitting it must be overruled.

With respect to other exceptions the record has been carefully examined, with the result that we are unable to sustain any of them. We have especially considered whether the verdict was palpably against the great weight of evidence. This is one of a class of cases in which the result may be questioned, especially by one who reads the record and had not the advantage of seeing and hearing the witnesses. That there is testimony strongly pointing to respondent as a participant

Digitized by Google

in committing the crime charged, cannot be doubted. We cannot say that the court erred in refusing a new trial.

The exceptions are overruled, and the court advised to proceed to judgment.

We cannot pass without some notice matter found in the briefs; that in the brief for the people being largely in reply to the statements in the original brief for respondent. For example, the court is informed by respondent's counsel that:

"An examination was had in justice court where respondent was bound over for trial. All this testimony was before the circuit judge, and before starting on the trial of the case the question as to the admissibility of this evidence was taken up by the circuit judge, prosecuting attorney, and respondent's counsel, and the prosecuting attorney then contended that, unless the same was admitted, he would have no case to submit to the jury, because without this testimony the evidence would fail to connect the respondent with the commission of the offense."

Again:

"The jurymen were mostly of Holland nationality—moral men who believe in the solemnity of the marriage ceremony. They were filled with religious passions and prejudices, and immediately they stigmatized respondent as a bad man because he married a woman and did not live with her as her husband. The prosecuting attorney knew too well the men before whom the case was being tried, and never failed to inject in the case details of the secret marriage; the name and adoption of the bastard child; the fact they had not lived together after marriage. In addition, the prosecuting attorney in his closing argument, by inference at least, held out the hope to the jury that respondent, if convicted, would make a confession as in the *Bert Tibbits Case.*"

After quoting from the argument of the prosecuting attorney, it is said:

Digitized by Google

"This might be the natural and logical reasoning of this jury, and if we were to go outside the record, we can say we know it was at least with one juror."

On the other hand, we are informed that a minority only of the jurors were of Holland descent, and that "Hollanders make mighty good, careful, and conscientious jurors, anyway." There is more of this. We are told that:

"Not one of them entered upon the trial of the case with any prejudice or any opinion," etc.

We cannot suppose that it is believed that the court should be influenced by such statements, even though made by eminent counsel. It must have been supposed that the court might be influenced by them.

BROOKE, C. J., and KUHN, STONE, BIRD, MOORE, and STEERE, JJ., concurred.

This was one of the causes assigned to the late Justice MCALVAY, undetermined at the time of his death.

JOHN S. NOEL CO. *v.* NEWCOMB.

1. CONTRACTS—SALES—INSTALLING ACETYLENE GAS PLANT—PART PERFORMANCE—DAMAGES.

Where plaintiff sold defendant an acetylene gas generator and certain fixtures by written contract, and agreed orally to install the same, and after the generator was delivered and partly installed defendant refused to allow him to finish, plaintiff is entitled to recover the contract price of the generator, and for such pipe and materials as had been used, at the contract price.

Digitized by Google

2. TRIAL—MISCONDUCT OF WITNESS—NEW TRIAL.

Although it was highly improper for plaintiff's witness to engage in a heated discussion about the case with a witness for defendant in the corridors of the courthouse, during a recess, the action of the judge, who investigated the incident at the time, in overruling a motion for a new trial, will not be reversed, where it does not appear that any juror heard what was said.

Error to Montcalm; Davis, J. Submitted January 11, 1915. (Docket No. 55.) Decided September 28, 1915.

Assumpsit by the John S. Noel Company against Sol B. Newcomb for the price of goods sold and delivered and work done. Judgment for plaintiff. Defendant brings error. Affirmed.

F. A. Miller and *N. O. Griswold*, for appellant.

J. Claude Youdan, for appellee.

OSTRANDER, J. In the amended narr. plaintiff sets up an express written contract for the sale and purchase of an acetylene gas generator and certain fixtures, and an express parol contract for its installation, the delivery of the generator, partial performance of the parol contract, refusal of defendant to permit complete performance, and consequent damages. The common counts in assumpsit are added. Defendant pleaded the general issue, with notice that it would show certain representations made by plaintiff respecting the generator, and certain items of the parol contract and representations made therewith, breaches of them, and consequent damages, which he would recoup.

The written contract contains a guaranty not involved here, and recites the understanding of the parties thereto that the instrument covers all agreements, that no agent or representative of plaintiff has

Digitized by Google

made any statements or verbal agreements modifying or adding to its terms or conditions.

The generator was delivered. The parol contract for installation admittedly was not fully performed. In a charge favorable to defendant the court submitted all issues of fact to a jury, which returned a verdict for plaintiff. Upon the merits of the case counsel for appellant refers in the brief to no exception and to no specific ruling of the court, except the one refusing at the close of plaintiff's case to direct a verdict for defendant. It is argued, however, that an improper rule for measuring plaintiff's damages was given to the jury. It does not appear that defendant preferred any requests for instructions, and a review of the charge does not satisfy us that the court failed to properly instruct the jury. The price of the generator was fixed. To install it, it was necessary to use pipe, the price of which, per foot, was fixed. Certain fixtures were to be installed, and the prices were fixed. Plaintiff claims, and the jury sustained the claim, that such fixtures as it had not furnished the defendant refused, that any defects in piping it would have repaired if permitted to do so. The jury was permitted to find, and did find, that plaintiff was entitled to recover the contract price of the generator and for certain pipe at 10 cents a foot. It is not apparent in what way the defendant was injured by this ruling.

A motion for a new trial was refused. The motion was based, in part, upon grounds affecting the merits, which deserve no attention here, in view of what is hereinbefore said, and in part upon affidavits tending to show that John S. Noel, a witness for plaintiff, had been guilty of improper conduct during the progress of the trial, prejudicial to defendant. Specifically, the charge is that this witness, during a recess of the court, engaged in a heated controversy and argument about the case with a witness for the defendant in the

Digitized by Google

corridor of the courthouse in the presence and hearing of members of the jury impaneled to try this cause; that he persisted, after being twice admonished by an officer of the court. None of the affidavits filed for the motion were made by jurors. Counter affidavits were filed, among them those of four of the jurors. In denying the motion, the court said:

"It has considered the complaint of the defendant, and all the affidavits submitted, and particularly the affidavits of the jurors filed in connection herewith, and in consideration of the further fact that at the time of the incidents complained of by the defendant the court made some personal investigation of the matter, not having been able to find any evidence of misconduct on the part of the witness that would justify further inquiry at that time on my part, I hereby certify that in the judgment of the court, after considering all of the evidence submitted and making the aforesaid investigation, that the claims of the defendant are not supported by facts sufficient as a reason for granting new trial. I further find that counsel for the defendant were advised of the incident complained of, and that one of counsel for the defendant was a witness to part of the conduct complained of, and that the defendant continued the trial of said cause after being so advised and informed."

It is said the court erred in not setting aside the verdict and granting a new trial. This court has had occasion in a few cases to consider similar questions. Many of them are collected in the opinion of this court in *McCartney* v. *Saul*, 180 Mich. 502 (147 N. W. 566). The impropriety of the conduct complained of is apparent; but it was not conduct which could influence a juror, unless a juror heard what was said. If it appeared that jurors listened to the conversation, or argument, we might ignore the question of its influence upon them. It does not appear that any juror heard what was said. We are disposed to accept the con-

Digitized by Google

clusion of the court, who was immediately informed, and then made some personal investigation.

The judgment is affirmed.

BROOKE, C. J., and KUHN, STONE, BIRD, MOORE, and STEERE, JJ., concurred.

The late Justice MCALVAY heard the argument in this cause, but took no part in this decision.

LAFAYETTE BENEVOLENT SOCIETY *v.* RICHARDSON.

EQUITY—JUDGMENT—CANCELLATION OF SHERIFF'S DEED—DEEDS.

Equity will not interfere to set aside a deed of real property sold by the sheriff on execution issued out of the circuit court upon a transcript of judgment rendered in justice's court in favor of defendant, where it appears that defendant acted in good faith in the proceedings before the justice, and that the garnishee summons was personally served upon an officer of complainant and an opportunity given to urge any defense it had.

Appeal from Wayne; McDonald, J., presiding. Submitted April 9, 1915. (Docket No. 31.) Decided September 28, 1915.

Bill by the Lafayette Benevolent Society, a corporation, against James W. Richardson and another for the cancellation of a sheriff's deed and other relief. From a decree for defendants, complainant appeals. Affirmed.

Oxtoby & Wilkinson, for appellant.

Ralph B. Wilkinson, for appellees.

Digitized by Google

MOORE, J. This is an appeal by the complainant from a decree in chancery dismissing the bill of complaint. The bill was filed for the purpose of setting aside as void a sale made by the sheriff of Wayne county of real estate of complainant. The sale was made by the sheriff under an execution issued out of the circuit court for Wayne county upon a transcript of judgment rendered in favor of the defendant James W. Richardson, by Louis Ott, a justice of the peace, and against the complainant as garnishee of Horton & Stoner. The bill prays that the judgment against the complainant, the sale, and the sheriff's certificate of sale be declared void and canceled, and that the sum of $501.59 paid under protest by the complainant to the register of deeds on June 2, 1913, for the purpose of redeeming said property may be returned to it. This money is still in the custody of the register of deeds by reason of a writ of injunction issued in this cause. The cause was heard in open court.

The record discloses that on November 10, 1911, the defendant James W. Richardson commenced a suit against Horton & Stoner, "whose first name is not known, but whose person is well known," doing business as Horton & Stoner. The original summons was returned not served on either of the defendants personally, nor by leaving a copy thereof at the last place of abode of either of said defendants. On November 20, 1911, an *alias* summons in the long form was issued. This summons was returned by the constable served on defendants Horton & Stoner, "whose first name is unknown, but whose person is well known," by personal service on Edgar H. Horton, "one of the within-named defendants, doing business as Horton & Stoner." Upon the return of the summons the plaintiff declared in assumpsit on all the common counts, and, no one appearing on behalf of the defendants, judgment was

Digitized by Google

rendered on December 1, 1911, in favor of the plaintiff and against the defendant for $439.73, and costs.

The claim is that, as the docket entries fail to disclose that at any time there was an amendment made in the process or pleadings to show that Edgar H. Horton, the person served with the *alias* summons, was the same person as the Horton named in said *alias* summons, and substituting the said Edgar H. Horton so served with the *alias* summons as the Horton referred to in the original summons, the judgment is void.

On November 11, 1911, defendant James W. Richardson instituted a garnishment proceeding against the complainant, as garnishee of Horton & Stoner. The important docket entries in that proceeding are as follows:

"Nov. 10, 1911. Affidavit of garnishment filed. Summons issued in hands of Constable Paradis, returnable Nov. 22, 1911, at 9 o'clock a. m.

"Nov. 11. Summons returned served by Constable Paradis on Joseph Aubrey, Treas., Nov. 11, 1911.

"Nov. 20, 8 a. m. Case called. Parties in court. Case adj. by consent to Dec. 4, 1911, a. m."

The record shows several adjournments by consent, and continues:

"Jan. 16, 9 a. m. Case called. Parties in court. Case adjourned by consent to Jan. 18, 1912, 9 a. m.

"Jan. 18, 9 a. m. Case called. Plaintiff in court. Defendant did not appear. Plaintiff declared in an action of assumpsit on all the common counts, especially for money had and received, claim damages $500.00 or under. James W. Richardson sworn for plaintiff. I thereupon rendered judgment in favor of plaintiff and against defendant for four hundred forty-one and 88/100 dollars damages and two dollars costs against garnishee defendant, Lafayette Benevolent Society.

"$441.88 Damages.
" 2.00 Costs.

"LOUIS OTT,
"Justice of the Peace."

Digitized by Google

If we understand the claim of counsel, it is that, as the summons against the principal debtors and the summons in the garnishment case were issued simultaneously, the garnishment proceeding is void. A further claim is made that Mr. Aubrey did not understand what it was necessary for him to do, and that he was told by the magistrate he might go, and that he supposed this proceeding was at an end.

It is not claimed that Horton & Stoner did not owe Richardson the full amount of the judgment, nor is it claimed that the Horton, upon whom service was made, was not, in fact, a member of the firm of Horton & Stoner. It has already appeared that the garnishee summons was personally served upon the treasurer of complainant, and that complainant appeared, and that the garnishee case was adjourned by consent from time to time. See *Chamberlain* v. *Wallace*, 176 Mich. 609 (142 N. W. 1072). It is, we think, apparent that an opportunity was given complainant in the garnishment case to urge any defense to the proceeding which it had.

In *Gray* v. *Barton*, 62 Mich. 186 (28 N. W. 813), the following appears:

"Equity will not relieve a party against a judgment at law on the ground of its being contrary to justice, unless the defendant was ignorant of his defense pending the suit, or facts could not be received as a defense at law, or unless, without any neglect or default on his part, he was prevented by fraud or accident, or the act of the opposite party, from availing himself of his defense. * * *

"In *Miller* v. *Morse*, 23 Mich. 368, where a new trial was asked in a court of equity to relieve against a judgment at law alleged to have been obtained by the fraudulent conspiracy and false swearing of the plaintiff, this court held that the complainants were not entitled to relief, and COOLEY, J., says:

"'And we do not see why, if this bill should be sustained, the defeated party might not maintain a similar one in nearly every case which the courts at law dispose of.'

Digitized by Google

"In that case, it is true, no new facts were presented to the court discovered after the motion for new trial had been made in a court at law; but the general doctrine is there maintained that courts of equity do not permit cases to be retried therein except where the judgment recovered is against conscience, and where the defeated party has been prevented from making his defense by the fraud or improper conduct of the opposite party, and without fault on his own part."

The doctrine of that case is reaffirmed in *Finn* v. *Adams*, 138 Mich. 258 (101 N. W. 533, 4 Am. & Eng. Ann. Cas. 1186), where Justice MONTGOMERY, speaking for the court, said:

"A judgment at law may be vacated by a court of equity in a proper case, but the exercise of such jurisdiction is rare. It is only exercised after it has been made to appear clearly that an injustice has been done. *Cleveland Iron Mining Co.* v. *Husby*, 72 Mich. 61 [40 N. W. 168]; *Mueller* v. *Marsh*, 116 Mich. 378 [74 N. W. 513]."

There is nothing in the record to indicate that in the proceedings before the magistrate Mr. Richardson was acting other than in the utmost good faith. It is also clear that complainant is not free from negligence. If the chancery court is to take cognizance of cases like this, continued litigation would be encouraged.

The decree is affirmed, with costs.

BROOKE, C. J., and KUHN, STONE, OSTRANDER, BIRD, and STEERE, JJ., concurred.

The late Justice MCALVAY took no part in this decision.

Digitized by Google

ROGERS *v.* FORD.

1 CARRIERS—NEGLIGENCE—CONTRIBUTORY NEGLIGENCE—WEIGHT OF EVIDENCE.

In a suit for personal injuries caused by falling down an elevator shaft, where there was evidence to support plaintiff's theory, and the questions at issue were submitted to the jury under proper instructions, the verdict and judgment will not be set aside as against the great weight of the evidence.

2. TRIAL—ARGUMENT OF COUNSEL—NEW TRIAL.

Argument of plaintiff's counsel, invited by argument of opposing counsel, while not to be commended, where the trial judge in his charge to the jury endeavored to correct it, and the amount of the verdict was not excessive, is not sufficient cause for reversal.

3. DAMAGES—CARRIERS—EXCESSIVE VERDICT.

In an action for personal injuries caused by falling down an elevator shaft, causing plaintiff, a police captain, much pain and suffering, and possible permanent injury, a verdict for $2,250 will not be set aside as excessive.

Error to Wayne; Gage, J., presiding. Submitted January 18, 1915. (Docket No. 118.) Decided September 28, 1915.

Case by Andrew J. Rogers against Edward Ford for personal injuries. Judgment for plaintiff. Defendant brings error. Affirmed.

Thomas M. Cotter (*Edward Donnelly*, of counsel), for appellant.

Richard I. Lawson, for appellee.

MOORE, J. This is a personal injury case. From a verdict and judgment in favor of the plaintiff in the sum of $2,250, the case is brought here by writ of error.

Digitized by Google

The appellant asks that the case be reversed for the following reasons:

I. The verdict is contrary to the greater weight of the evidence.
II. The verdict is grossly excessive in amount.
III. There was error in argument of plaintiff's counsel.
IV. Refusal of defendant's fifth request to charge.
V. The overruling of defendant's objection to the question: "Is it a usual thing to operate the elevator when the doors are open?"
VI. Denial of motion for new trial.

The first and sixth of these reasons may be considered together. Plaintiff, on April 5, 1913, went to the Ford Building for the purpose of getting lunch at a restaurant on the second floor. This is a large office building owned by defendant. The plaintiff entered an elevator on the ground floor. The elevator, at the request of the plaintiff and another passenger, stopped at the second floor. The other passenger, a Mr. Wright, who was a witness in the case, got off at the second floor. The plaintiff attempted to follow Mr. Wright from the elevator, and as he was doing so met with the accident resulting in the injuries for which this suit is brought. Before plaintiff succeeded in leaving the elevator, it started upward. It was stopped soon after suddenly, and plaintiff fell upon the second floor of the building. From this point he either rolled or bounded back into the elevator shaft; the doors to the shaft at that floor having reopened, and the elevator having gone about three or four feet above the second floor. The plaintiff grasped the cable that hung beneath the elevator car. The elevator was then lowered to the ground floor, and the plaintiff was released.

It was the plaintiff's theory that the elevator started without notice to him while he was attempting with due care to leave it, that the doors of the elevator were fully opened and the elevator stationary when he at-

Digitized by Google

tempted to leave it, and that he followed Mr. Wright promptly in leaving the elevator. He gave testimony tending to support this theory.

It was defendant's theory that, after Mr. Wright left the elevator, the plaintiff did not follow him, or move to follow him, or give any indication or desire to leave the elevator, and that the operator thereupon started to close the doors, and while they were closing, and as the elevator started to rise, the plaintiff attempted to get out by thrusting himself between the closing doors, and that he was guilty of contributory negligence in so doing. There was testimony tending to support this theory.

The testimony was not in harmony. The trial judge left these conflicting theories under a fair charge to the jury, with the result already stated. After the verdict a motion was made for a new trial for substantially the same reasons for which a reversal is asked here. In denying the motion the trial judge stated he thought there was an abundance of testimony to justify the verdict. We agree with him.

Should the case be reversed because of the argument of counsel? It is stated in the brief, and was stated on the oral argument, that the argument now criticized was invited by the argument of opposing counsel. The trial judge dealt with part of the argument at the time. In denying the motion for a new trial, he said of it:

"As to the third ground, I was of the opinion at the time of the argument that the counsel for the plaintiff, in his zeal, made statements that he should not have made; but I endeavored to correct them in the charge, and if a slip is made by an attorney in his argument it can be corrected by the cautions and instructions of the judge. I believe that was done in this case."

The argument is not to be commended, but in view of what was done by the trial judge, and the amount of the verdict, we do not think the case should be reversed because of the argument.

Digitized by Google

This brings us to the remaining question requiring discussion. Should the case be reversed because the verdict is excessive? It is true plaintiff was getting old; but he seems to have been in good health at the time of, and for many years prior to, the accident. He was a captain of the police force. He described in detail the injuries he received and the pain he has suffered and is suffering. One of the doctors described the physical condition of the plaintiff as he found it, and testified:

"In my opinion this injury will have a tendency to shorten the life of the plaintiff. My reason for so stating is that the suffering of this pain tends to shorten a person's life to a certain extent, and the pain is caused by internal organs and the muscles, which is liable to be very serious at any time."

Another physician who saw the plaintiff in the lobby of the Ford Building, and his injuries immediately after the accident, and who saw him later and examined him with care, described *in extenso* the conditions he found, and testified:

"*Q.* Can you say in your judgment that the injury is not permanent?

"*A.* No; I cannot. I say in my estimation the injury is permanent. That is all I can say, I can't go beyond that; no one can.

"*Q.* The injury is permanent?

"*A.* In my opinion."

There is other testimony of a like character. We find no reversible error.

Judgment is affirmed.

BROOKE, C. J., and KUHN, STONE, OSTRANDER, BIRD, and STEERE, JJ., concurred.

This case was originally assigned to the late Justice MCALVAY.

Digitized by Google

WOLVERINE LAND CO. *v.* JEROME.

TAXATION—TAX DEEDS—LIMITATION OF ACTIONS—STATUTES.

In an action of ejectment to recover possession of land purchased by tax deeds, one dated February 10, 1897, for the taxes of 1893, and the other May 3, 1898, for the taxes of 1894, the court was in error in directing a verdict for defendant on the ground that the provisions of section 115, Act No. 153, Pub. Acts 1885, limiting the right of action to five years after the execution of the tax deed, controlled; the section relied upon having been repealed by Act No. 206, Pub. Acts 1893.

Error to Oakland; Smith, J. Submitted April 22, 1915. (Docket No. 97.) Decided September 28, 1915.

Ejectment by the Wolverine Land Company against Edwin Jerome for the possession of land purchased by tax deed. Judgment for defendant on directed verdict. Plaintiff brings error. Reversed.

D. W. Closser (*Peter B. Bromley* and *R. S. Woodliff*, of counsel), for appellant.

James H. Lynch, for appellee.

MOORE, J. This is an action of ejectment, brought to recover the possession of an undivided one-half of 40 acres of land in Royal Oak township. From a directed verdict in favor of the defendant, the case is brought here by writ of error.

Defendant is the owner of an undivided half of said land by line of conveyance. Plaintiff claims title by virtue of tax deeds, one dated February 10, 1897, for the taxes of 1893, and the other May 3, 1898, for the taxes of 1894. These deeds were acquired from the State by Judge Baldwin, who subsequently died, and whose representatives conveyed the land to the plaintiff May 29, 1903, 5 years and 26 days after the date of the latest deed to Judge Baldwin.

Digitized by Google

The plaintiff filed a petition for writ of assistance, which is sworn to July 16, 1903, which states in paragraph 9 thereof "that the said lands are now in possession of Edwin Jerome and Frank H. Jerome." Frank, who was a brother and tenant in common with defendant, Edwin Jerome, subsequently purchased the title of plaintiff in said lands. Consequently by the sworn petition of plaintiff the defendant, Edwin Jerome, was in possession of these lands 5 years and 2½ months after the date of the tax deed of May 3, 1898.

Counsel for the appellee concedes (we quote from the brief):

"If plaintiff's right to possession under these deeds was not barred July 16, 1903, then defendant has no defense. If it was barred, then plaintiff has no standing in this suit."

A disposition of the case makes it necessary to refer to certain tax statutes. Act No. 153, Pub. Acts 1885, was a general tax law. Section 115 reads:

"The right to recover possession of any land by any person claiming through or under any deed executed by the auditor general by virtue of the provisions of this act shall be forever barred by the actual, open, and continuous possession of any person claiming such land adversely to such tax deed for the period of five years after the execution of such tax deed: *Provided*, that if the person claiming through or under such tax deed shall have once taken actual and peaceable possession of such land, by virtue of his deed, and shall have continued in such actual possession for five years next thereafter, then the provisions of this section shall not apply, but in such case he shall be conclusively deemed the owner in fee simple of such land."

It is the claim of appellant that the tax law of 1885 was superseded by Act No. 195, Pub. Acts 1889, which later act was superseded by Act No. 200, Pub. Acts 1891, which was in turn superseded by Act No. 206 Pub. Acts 1893, which later act it is claimed was in

Digitized by Google

full force when the tax deeds involved in this proceeding were obtained.

It is the claim of the appellee that the limitation clauses of the act of 1885 remained in force until 1907. We quote from the brief:

"The proposition, then, before the court, is simply this: Are the provisions of section 115 of the tax law of 1885 applicable to plaintiff's deed acquired in 1893? I think they are."

The circuit judge accepted the contention of counsel for appellee, and it is claimed that the case of *St. Mary's Power Co.* v. *Water-Power Co.*, 133 Mich. 470 (95 N. W. 554), sustains the action of the circuit judge. The tax deed in that case was issued upon a sale made October 2, 1888, and it was held in the case cited that the provisions of section 115, *supra*, applied. In the instant case the tax deed was obtained in 1897 for the taxes of 1893, and the plaintiff claims that Act No. 206, Pub. Acts 1893, which has no limitation provision like that contained in the act of 1885, should control. So far as the decision in *St. Mary's Power Co.* v. *Water-Power Co.*, *supra*, is applicable to the instant case, it would tend to sustain the contention of appellant. Justice HOOKER used the following language:

"If, as contended by counsel for the defendant, sections 115 and 116 of the law of 1885 were substantially re-enacted in section 66 of the law of 1889 and section 67 of the law of 1891, they fell with the rest of those acts by the explicit repeal in 1893."

The title of Act No. 206, Pub. Acts 1893, closes as follows:

"And to repeal act number two hundred of the Public Acts of 1891, and all other acts and parts of acts in any wise contravening any of the provisions of this act."

The repealing language in the body of the act is contained in section 126. We think it must be said that

Digitized by Google

the instant case is controlled by the law of 1893, instead of by the law of 1885.

The judgment is reversed, and a new trial granted.

BROOKE, C. J., and KUHN, STONE, OSTRANDER, BIRD, and STEERE, JJ., concurred.

The late Justice MCALVAY took no part in this decision.

PARENT *v.* HODGES.

BOUNDARIES—LINE FENCE—QUIETING TITLE—EVIDENCE.

In a suit to establish a boundary line and quiet title to land, brought under section 11965, 4 How. Stat. (2d Ed.), evidence examined, and *held*, to establish the existence of the boundary line, as at present occupied by a fence, for more than 20 years, and a decree for complainant is affirmed.

Appeal from Oakland; Smith, J. Submitted June 8, 1915. (Docket No. 8.) Decided September 28, 1915.

Bill by Dollie B. Parent and others against George S. Hodges and others, under section 11965, 4 How. Stat. (2d Ed.) to establish a boundary line and quiet title to land. From a decree for complainants, defendants appeal. Affirmed.

Dondero & Howarth (*Pelton & McGee* and *Peter B. Bromley*, of counsel), for complainants.

Patterson & Patterson, for defendants.

Digitized by Google

MOORE, J. This bill was filed February 25, 1914, for the purpose of establishing a boundary line and quieting title to land. From a decree in accordance with the prayer of the bill of complaint, the case is brought here by appeal.

Virgil M. Rose, on the 17th of July, 1883, conveyed by warranty deed to Mariva Hodges, his daughter, the south 40 acres off from that portion of the N. W. ¼ of section 27, in township 1 N., of range 11 E., in Royal Oak, Mich., lying east of the Detroit and Birmingham plank road, reserving a life estate to Virgil M. Rose. On February 20, 1893, Mr. Rose quitclaimed to Mrs. Hodges the 40 acres above conveyed, thereby releasing his life estate to her. On July 31, 1883, Virgil M. Rose conveyed to Harriet D. Carew, his daughter, all that portion of the N. W. ¼ of section 27, in the township of Royal Oak, Oakland county, Mich., lying east of the Detroit and Birmingham turnpike, containing 122 acres, more or less, except 40 acres off the south side, reserving a life lease. Mr. Rose died in June, 1894. On February 21, 1905, Harriet D. Carew conveyed to her daughters, Dollie B. Parent, Bessie D. McGuire, Kittie H. Wilcox, and Delia M. Hamilton, the premises mentioned in the deed from Virgil M. Rose to Harriet D. Carew. At the time of the death of Mariva Hodges, in November, 1904, she owned the 40 acres, and George S. Hodges, as one of her two heirs, inherited an undivided one-half of the property and received a deed from Helen M. Bertrand, daughter of his brother, Schuyler G. Hodges, deceased, of the other half. The daughters of Mrs. Carew divided the land deeded to them into four equal parts, and the parcel of 24.15 acres immediately north of the Hodges 40 was set off to Dollie B. Parent, the complainant. About 4 years before the bill of complaint was filed, Dollie B. Parent built a house near the fence on the north side of the 40 acres

Digitized by Google

and on the strip of land now in dispute; the house being valued at $10,000. She claims that, while she was building it, George S. Hodges, the defendant, came to the house and talked with her and made no claim that she was building her house on his land. Mr. Hodges, before this suit was brought, gave the Michelson Land Company a land contract for his 40 acres. This company claimed to own the land north of where Mrs. Parent claims is the boundary fence, including the land upon which Mrs. Parent has built her house.

The complainants claim the right to file this bill of complaint by virtue of section 11965, 4 How. Stat. (2d Ed.). The litigation grows out of conflicting surveys. The complainants claim that a survey made by a Mr. Wilmarth in 1888 is the correct survey, while defendants claim that a survey made by Mr. Russell should control. Complainants also claim that a boundary fence between the Hodges 40 and the land claimed by complainants has existed and been recognized for more than 30 years. As to the fences we quote from the brief of defendants:

"Regarding the north line of the Hodges 40, it appears that the present post and wire fence that is referred to in the record has been built only 7 or 8 years, and that fence has not been built long enough to be used as a boundary fence to establish the ownership of the parties on either side of it. With the exception of this post and wire fence, which was built by Mrs. Parent, the other fences referred to were in existence for many years, and during the lifetime of Virgil M. Rose, when he owned and occupied and controlled the entire property. This post and wire fence was placed on the line run by Surveyor Slater, when he was instructed to run an arbitrary line to include 40 acres from the Wilmarth quarter line, so that occupancy or claim of possession on the part of Mrs. Parent is not sufficient under the statute to base a claim, and I therefore contend that the north line of the property is to be determined and depends upon the location of the quarter section line. Whatever the character or loca-

Digitized by Google

tion of the old fences that were in existence during the life of Virgil M. Rose, they certainly cannot be construed to be and were not division fences."

In this connection it should not be forgotten that Mr. Rose parted with all his interest in the south 40 acres 21 years before this suit was brought, and died nearly 20 years before.

The case was tried in open court. As to the boundary fence the court found:

"For 35 years or more a fence has existed, renewed when burned or decayed, and upon the same line as the present fence, separating what is called in this case 'the timber lot' from the remainder of the farm. The proofs are so preponderating that I call them conclusive that Mr. Rose supposed this timbered lot contained 40 acres. It did, if the Wilmarth survey is correct. It was called the south 40 acres. * * * All three parties clearly then understood the line of the fence was the division line. * * * It marked the line of the lands the parties understood he was giving to his daughters. The daughters of Mrs. Carew so understood it when they received their deed, and when they so divided it as to give Mrs. Parent this strip in her one-fourth. Mr. Rose, since the quitclaim deed of his life estate to Mrs. Hodges in February, 1893, also Mrs. Carew and her daughters, since the death of Rose in 1894, have been in actual and adverse possession of the land to this fence."

As to the surveys he expressed himself as follows:

"Because the solicitors were so urgent as to these various surveys in the record, they are considered briefly. A certified copy of the field notes of the original United States government survey made in 1816 was presented. One Hervey Parke, of Pontiac, did much surveying in Oakland, after the county was settled, or partially so. He left notes, among which were some of this section. In 1865 the board of supervisors purchased the Parke notes, and subsequent surveyors made records in books from them, which are kept in the county clerk's office. Whether the Parke survey of section 27 was based upon the government survey and monuments, or on the location of the highways, or

Digitized by Google

whether it was correct, does not appear. County surveyors have since added to these books of record, and surveyors use them. Reuben Russell seems to have made a survey on section 27, based upon the Parke survey, which gave rise to the controversy over the boundary lines. It is claimed the Duffields moved their north line, so as to take in a strip from the Hodges 40, because of the new surveys. Just how much does not appear. I have no confidence in the correctness of the Russell surveys. If the statement purporting to come from Serrell (a surveyor of much experience here, who assisted Russell) is admissible, Russell found no posts or monuments, but set corner posts where he claimed he remembered they had been. It is a part of the record that he made a survey on section 28, and later admitted he had made a mistake of 4 rods. The surveys made by Messrs. Slater and Fisher were based upon the Pontiac records of the Parke and Russell survey. Upon this record I think the Wilmarth survey the more reliable, and as more nearly agreeing with the original government survey. It seems probable that Messrs. Wilmarth and Wilcox did discover what had once been the marking of the quarter section corner by the government surveyors."

The case is well briefed, and it was argued at length orally. The record has more than 200 printed pages. In addition, we have many blueprints and tracings, and copies of field notes. It would do no one any good to set out the record in detail. We think it establishes the fact of the existence of the boundary fence for more than 20 years, and that if the Wilmarth survey is to prevail, and it ought to prevail, the fence is in the proper place.

The decree is affirmed.

BROOKE, C. J., and KUHN, STONE, OSTRANDER, BIRD, and STEERE, JJ., concurred.

The late Justice MCALVAY took no part in this decision.

Digitized by Google

GREENMAN *v.* GILLERMAN'S ESTATE.

1. PARENT AND CHILD—SUPPORT AND MAINTENANCE—EVIDENCE—DIRECTED VERDICT.

In an action by the natural mother against the estate of an adopting father for the support and maintenance of the adopted child, the action of the trial court in directing a verdict for the defendant is erroneous, as the evidence, considered most favorable to plaintiff, showed that both claimant and decedent expected he would at least contribute to the support of the child.

2. SAME—ADOPTION—LIABILITY FOR SUPPORT.

A person adopting a child under section 11640, 4 How. Stat. (2d Ed.), stands in the place of a parent to such child and is liable to all the duties and entitled to all the rights of a parent.

Error to Kent; North, J., presiding. Submitted June 21, 1915. (Docket No. 80.) Decided September 28, 1915.

Esther Greenman presented a claim against the estate of August Gillerman, deceased, for the support of an adopted child. From an allowance of the claim in the sum of $266.75, the administrator appealed to the circuit court. Judgment for defendant on a directed verdict. Claimant brings error. Reversed.

E. A. Maher, for appellant.

Corie C. Coburn, for appellee.

MOORE, J. The claimant presented against the estate of August Gillerman, deceased, a claim for the board, clothing, and care of Florence Gillerman from August 19, 1911, to August 20, 1913. The claim was allowed in the probate court at the sum of $266.75. Upon appeal by the administrator to the circuit court, the cause was brought on for trial before a jury and the trial judge directed that a verdict be entered disallow-

Digitized by Google

ing the claim. The case is brought here by writ of error. The sole question is: Was the judge justified in directing a verdict?

In June, 1906, Mr. and Mrs. Greenman were very poor. Mr. Greenman was a dissipated man and had been away from his family for about three years. On the 6th of June, 1906, Mr. and Mrs. Gillerman by proceedings in probate court formally adopted Florence Greenman, who was then five years old. Mrs. Carrie Gillerman became insane about 1910, and later died. Florence was then for a time in the family of Mr. and Mrs. John Edwards, where Mr. Gillerman boarded, and he paid for her care. After a time Mrs. Edwards' health failed, and Florence was taken to the Blodgett Home, where Mr. Gillerman paid for her care. Later she was returned to the Edwards home for a little time, when, because of the ill health of Mrs. Edwards, it was arranged with the claimant to take care of her. When this arrangement was made, the child had been with the Gillermans so long that she did not know that the claimant was her mother. Some time after this arrangement was made Mr. Gillerman married again. He was for a long time out of health, and later died. His estate consists of money paid by the railway company for injuries which caused his death.

The circuit judge was of the opinion that the case was controlled by *Thorp* v. *Bateman*, 37 Mich. 68 (26 Am. Rep. 497), and for that reason directed a verdict in favor of the estate. Counsel for appellee insist that not only is the case within *Thorp* v. *Bateman*, but that it is also within *Harris* v. *Harris*, 106 Mich. 246 (64 N. W. 15), *Decker* v. *Kanous' Estate*, 129 Mich. 146 (88 N. W. 398), *Rodgers* v. *Lamb's Estate*, 137 Mich. 241 (100 N. W. 440), and *In re Colburn's Estate*, 153 Mich. 206 (116 N. W. 986, 126 Am. St. Rep. 479), and that judgment should not be disturbed.

The case is a peculiar one in its facts. It should be

Digitized by Google

decided upon the status of the arrangement between the adopted father and the natural mother, coupled with the obligations growing out of those relationships. There is no question but that Florence was legally adopted by Mr. Gillerman, and his duties to the child then became fixed by the statute. She went to live with him, and he supported her until after the death of his wife and until Mrs. Edwards, with whom Mr. Gillerman boarded, became so ill the child could no longer remain there.

Mrs. Edwards testified that she went to see Mrs. Greenman at Mr. Gillerman's request.

"He asked me if I would do him that favor, to go there, and I did.

"*Q.* What was the reason the child went away from your place, or was going away again?

"*A.* I was sick at the time and unable to take care of her. Mrs. Greenman came to my place to see Mr. Gillerman the next morning after I saw her. I heard some talk between Mr. Gillerman and Mrs. Greenman at that time. I did not hear much of the conversation, but I heard him tell her that he would help her to take care of Florence, and that she would never want. Florence was taken to Mrs. Greenman about a week later. She remained at our place in the meantime. I heard Mr. Gillerman say to Florence that he was going to take her to her mother, and she said that she did not want to go there, because she was not her mother. After the child was taken to Mrs. Greenman, Mr. Gillerman continued to live at our house. While the child was living at our house Mr. Gillerman paid for her board. He also paid for her board at the children's home. While Florence was in our house Mr. Gillerman was there every day. He worked during the day and came home to dinner. Florence was attending school at that time. Mr. Gillerman purchased her clothing. I did her laundry work."

Florence Gillerman was a witness. She testified in part as follows:

"*Q.* Who did you go there [to the claimant's] with in the first place?

Digitized by Google

"A. My papa, Mr. Gillerman.
"Q. Did he talk with you about taking you there before he went there?
"A. Yes, sir.
"Q. Did you know Mrs. Greenman was your mother at that time?
"A. Yes; just the night before he took me there.
"Q. Had you understood that you was an adopted child of Mr. Gillerman?
"A. No, sir.
"Q. Had you supposed that you were his own child up to that time?
"A. Yes, sir.
"Q. Had you ever seen Mrs. Greenman?
"A. Yes; she worked at Mr. Edwards'.
"Q. Do you know whether she depends on her work for her living?
"A. Yes, sir.
"Q. Where did Mr. Gillerman talk with you first about taking you there?
"A. The night before he took me there he said that I should be a good girl, and when I got bigger he would come and get me.
"Q. Who went with you when you went to Mrs. Greenman's?
"A. Mr. Edwards and papa.
"Q. By 'papa' you mean Mr. Gillerman?
"A. Yes, sir.
"Q. What did you hear said there when you got there? Did Mr. Gillerman talk with you there?
"A. Yes, sir.
"Q. Did he talk with Mrs. Greenman?
"A. Yes, sir.
"Q. What did he say to you there?
"A. He said he would help me along and buy me some clothes as soon as he got some money, and see that I had a good education.
"Q. What did he say to Mrs. Greenman?
"A. I don't know; I was crying."

John Edwards testified in part as follows:

"Florence lived in our family better than a year. August Gillerman lived there at the same time. Florence did not live there continually. She was at the

Digitized by Google

Blodgett Home for one month. I guess that is all until she went to her mother's. I went with Mr. Gillerman when Florence was taken to Mrs. Greenman's.

"Q. What did he say, or did he say anything, about his purpose in taking her there, to you or in your hearing?

"A. Why, I did not pay much attention to it at that time. He spoke about leaving her there. I don't know just what the conversation was.

"Q. Did you hear any conversation between Mr. Gillerman and Mrs. Greenman when he left Florence there?

"A. Not that I remember; no.

"Q. Did you hear any talk about it at all.

"A. Nothing any more than he would look after her and see that she did not want for anything; that is all I remember of him saying. * * *

"Q. As a matter of fact, you never heard Mr. Gillerman say anything to Mrs. Greenman about his paying her, did you?

"A. No, sir.

"Q. The only thing you heard Mr. Gillerman say was that he would take care of the child?

"A. Yes, sir.

"Q. What was that?

"A. That was the night he took her home. She sat on his lap and cried, and he cried himself and he promised her that he would never see her in want."

At the time of the arrangement the claimant was still very poor and was making a living by taking in washings and going out to wash. Her husband was then at home occasionally, but remained dissipated and did but little for the family. Later he was sent to prison, and the claimant got a divorce from him. It is claimed there was a paper showing claimant was willing to readopt the child. She attempted to testify about this, but was not allowed to, because of the objection of counsel for appellee. The paper does not appear in the record, but it does appear that no proceedings were had in probate court.

We have purposely quoted the testimony most favor-

Digitized by Google

able to claimant. The difficulty of showing what the arrangement was is apparent, as no one who was taking notice was present when it was made, except Mrs. Greenman, whose lips are sealed by the statute, and Mr. Gillerman, whose lips are sealed by death. Enough does appear, however, to indicate that Mr. Gillerman expected to at least contribute to the support of the child, and that the claimant expected he would do so.

A reading of the cases relied upon by the appellee will show them distinguishable from the instant case. When Mr. Gillerman adopted the child the statute (4 How. Stat. [2d Ed.] § 11640) fixed his relations toward it, "whereupon * * * the person or persons so adopting such child shall thereupon stand in the place of a parent or parents to such child in law, and be liable to all the duties and entitled to all the rights of parents thereto, * * * the same as if he or she were in fact the child of such person or persons." The obligation of a parent to support a child is discussed in *Courtright* v. *Courtright*, 40 Mich. 633, and *Finn* v. *Adams*, 138 Mich. 258 (101 N. W. 533, 4 Am. & Eng. Ann. Cas. 1186).

We think the judge erred in stating, as a matter of law, that Mr. Gillerman was relieved of the duty of supporting this child, and that it devolved upon the claimant.

The case is reversed, and a new trial ordered.

BROOKE, C. J., and KUHN, STONE, OSTRANDER, BIRD, and STEERE, JJ., concurred.

The late Justice MCALVAY took no part in this decision.

Digitized by Google

ROCKFORD MALLEABLE IRON WORKS *v.* TILDEN.

1. WITNESSES—MATTERS EQUALLY WITHIN KNOWLEDGE OF DECEASED —CONFLICT OF LAWS.

The trial court was not in error in excluding testimony of defendant as to a subsequent oral agreement with the president of plaintiff, since deceased, modifying the original contract, although the agreement was made in Illinois; the law of this State would govern. 5 How. Stat. (2d Ed.) § 12856.

2. SAME — CROSS-EXAMINATION — DISCRETION OF COURT — SET-OFF AND RECOUPMENT.

Where defendant sought to recoup damages for breach of contract, and plaintiff contended it was unable to fulfill because the proper materials were not furnished by defendant, and defendant claimed that they were the same he had furnished others, and that no complaint had ever been made, cross-examination of defendant as to his contention did not exceed the discretion lodged in the trial judge.

3. DAMAGES—BREACH OF CONTRACT—MEASURE OF DAMAGES—SALES.

The measure of damages for the breach of a contract of sale is the difference between the contract price of the goods and what they would cost the buyer at the time of the breach, and it is not necessary, in order to recover, that he actually purchase the goods.

Error to Van Buren; Des Voignes, J. Submitted June 25, 1915. (Docket No. 51.) Decided September 28, 1915.

Assumpsit by the Rockford Malleable Iron Works, a foreign corporation, against B. E. Tilden for a balance claimed to be due for goods sold and delivered. Judgment for plaintiff. Defendant brings error. Reversed.

David Anderson, for appellant.

Glenn E. Warner, for appellee.

MOORE, J. Plaintiff sued to recover a balance

Digitized by Google

claimed to be due for a quantity of malleable iron replacing frogs, which it delivered to defendant, of $414.91, and interest.

Defendant pleaded the general issue, and gave notice that he entered into a supplemental agreement with Harry Forbes, president of the plaintiff company, to take the place of the first contract. The defendant also gave notice under the plea of the general issue of damages he claimed to have sustained because of the alleged breach of the contract by the plaintiff. The items which he sought to recoup aggregated $491.32. The jury found in favor of the plaintiff for the full amount of its claim. From a judgment entered on the verdict the case is brought here by writ of error.

The assignments of error are argued under the following heads:

(1) Error of the court in excluding the testimony of defendant as to the supplemental agreement between himself and this defendant company, acting by its president, Harry Forbes.

(2) The erroneous and prejudicial cross-examination of the defendant as to his contracts with other companies, his having lawsuits with them, and as to the name under which this defendant had done business, and as to the reasons why different companies refused to take the contract for making these goods after plaintiff failed in its efforts so to do.

(3) Errors of the court in his instructions to the jury.

We will consider the assignments of error in the order in which they were presented.

1. It is urged the court should have permitted Mr. Tilden to testify to the making of a supplemental agreement with Mr. Forbes, though he is dead, and though his testimony is covered by the Michigan statute, because the contract was made in Illinois, and that, in the absence of testimony as to the Illinois statute, there is no presumption that the law is the same as

Digitized by Google

that of Michigan. Counsel concludes this part of his argument by saying:

"We wish to say frankly to the court that we have searched diligently through the authorities so far as they are accessible to us, and have been unable to find any authority on either side of this question. So far as we have been able to discover, the question has never been passed upon."

We think the following authorities sustain the ruling of the circuit judge in excluding the testimony: See *Home Life Ins. Co.* v. *Elwell,* 111 Mich. 689 (70 N. W. 334), *Kirtland* v. *Wanzer,* 2 Duer (N. Y.) 278; *Downer* v. *Chesebrough,* 36 Conn. 39 (4 Am. Rep. 29); 9 Cyc. p. 690, and notes.

2. The appellant contends that the court erred in permitting the cross-examination of the defendant. Defendant sought to recoup damages for breach of the contract. Plaintiff claimed it was unable to fulfill the contract because the proper patterns, flasks, and cores were not furnished. Defendant claims it did furnish proper patterns, flasks, and cores, and that they were the same it had furnished others, and that no complaint had ever been made.

The cross-examination related to this contention of the defendant, and did not exceed the discretion lodged in the trial judge. *Ritchie* v. *Stenius,* 73 Mich. 563 (41 N. W. 687); *Georgia* v. *Bond,* 114 Mich. 196 (72 N. W. 232); *Cummings* v. *Railway,* 163 Mich 304 (128 N. W. 206).

3. Appellant claims the court erred in his instructions to the jury. It was his theory that he was entitled to recover the difference between the price in his contract with plaintiff and what he would have to pay to procure these goods from any other source. This difference in the price was the largest element of his claim of damages. He testified that he could not buy the castings for less than 2¾ cents per pound; that

Digitized by Google

he sought to place contracts in several places at that time, and was unable to do so; that he finally succeeded in making two contracts each for 500 pairs at 2¾ cents per pound. These contracts were in writing, and were in evidence, though all that appears of them in the record is as follows:

"The contracts offered show the prices and the dates. In Exhibit O the date is October 25, 1911, and the price to be 2¾ cents per pound, f. o. b. Chicago, or Chicago rail freight allowed. The other contract is dated December 26, 1911, and the price is exactly the same 2¾ cents per pound, f. o. b. Chicago, or Chicago rail freight allowed."

Defendant claims that when he had proved it would require this advanced price to procure the goods he had proved all that it was necessary for him to prove to establish this part of his claim. He complains of that part of the charge reading as follows:

"Defendant is not entitled to any damages under this subsequent contract unless you find in this case he has proved that he ordered and paid for frogs from the Lakeside Malleable Castings Company, of Racine Junction. In other words, the mere fact that he made a contract does not establish that he has been damaged or that he has purchased any goods from the Lakeside Malleable Castings Company. It must appear that he made purchases in order to show that he suffered damages by reason of the nondelivery of any of the castings in this case. In other words, gentlemen, in order that you may clearly understand what that instruction stands for, it means simply this, that the fact that there was a thousand castings or pairs contracted for in this case is no material consequence, unless you find that plaintiff in this case by reason of a failure to furnish castings to this defendant, that defendant thereby suffered a loss and sale to customers in that respect."

In 3 Sutherland on Damages (3d Ed.), § 699, occurs the following:

"In such cases the employer is generally entitled to measure his damages by what the necessary expense

Digitized by Google

would be to procure to be done the work which the contractor neglected to do, whether it is done or not; for the same reason that a vendee in an executory contract for the sale of goods need not, in fact, purchase the goods he was entitled to receive from the vendor in order to have his damages computed on the basis of what they would cost him at the time of the breach."

In the recent case of *Newton* v. *Construction Co.*, 184 Mich. 63 (150 N. W. 348), there is a discussion at some length of the law which is applicable to the instant case. We content ourselves with referring to that opinion. We think the court erred in that part of the charge we have quoted.

Judgment is reversed, and a new trial ordered.

BROOKE, C. J., and KUHN, STONE, OSTRANDER, BIRD, and STEERE, JJ., concurred.

The late Justice MCALVAY took no part in this decision.

PEARL *v.* DETROIT UNITED RAILWAY.

1. STREET RAILWAYS—PERSONAL INJURIES—NEGLIGENCE—QUESTION FOR JURY—DIRECTED VERDICT.

   In an action against a street railway company for personal injuries to plaintiff, caused by defendant's street car colliding with a wagon in which plaintiff was riding, *held*, the evidence presented by plaintiff raised an issue for the jury.

2. SAME—TRIAL—INSTRUCTIONS—NEGLIGENCE.

   An instruction by the court that it was the duty of the motorman operating the approaching car, when the plaintiff was crossing in full view, to operate the car so as to

Digitized by Google

avoid a collision with him, if possible, and if he did not do so, but collided with and injured plaintiff, then the defendant was guilty of negligence, was erroneous, as it held him to a higher degree of care than the law demands, and was misleading.

Error to Wayne; Codd, J. Submitted June 21, 1915. (Docket No. 79.) Decided September 28, 1915.

Case by Max Pearl against the Detroit United Railway for personal injuries. Judgment for plaintiff. Defendant brings error. Reversed.

Corliss, Leete & Moody (*Wm. G. Fitzpatrick*, of counsel), for appellant.

Washington I. Robinson, for appellee.

MOORE, J. Plaintiff was driving a single horse and wagon east on Jefferson avenue west, in the vicinity of Solvay avenue, in the city of Detroit, about midday of the 10th of August, 1911. Jefferson avenue runs east and west, and Solvay avenue north from the north side of Jefferson avenue. Jefferson avenue is about 50 feet wide between curbs. The defendant's double car tracks are located in the center of the street, leaving about 17 feet of highway on either side. From the curbs to within a few inches of the rails on either side the street is paved; the space between the rails and between the tracks being unpaved, but filled in with broken stone.

Plaintiff claimed that, when he came to Solvay avenue, he undertook to turn north to go over both street car tracks, and before doing so looked to the west and saw a car a block or a block and a half distant, approaching the intersection. At the same time he saw another car approaching from the east a block away. Thinking that he could cross the tracks, he turned his horse to the north. Proceeding, his horse crossed the

Digitized by Google

east-bound or southerly track, the "devil" strip between both tracks, and got upon or between the rails of the northerly or west-bound track, when he suddenly became alarmed at the rapid approach of the west-bound car, and decided it was best not to undertake to complete the crossing ahead of it, and he started to turn to the right, intending to swing off to the south-east and get back upon the south side of Jefferson avenue. His wagon got stalled, and the east-bound car struck the rear of his wagon.

The defendant's claim and theory was and is that the plaintiff was proceeding east on or with the wheels of his wagon straddle the north rail of the northerly or west-bound track; that while in this situation he was observed by the motormen of both cars; that he was "in the clear" so far as the east-bound car was concerned; that when within 20 to 30 feet ahead of the east-bound car he suddenly, and without looking to the rear, turned his wagon to the right directly in the path of the car; that, despite all that could be done to prevent, the car struck the wagon about in the middle, or near the right front wheel. The motorman of the west-bound car, seeing the danger, stopped and just stepped out of the vestibule, when the wagon was thrown upon the left front corner of the vestibule, breaking the glass in the windows, and tearing the controller box loose. The plaintiff's wagon was demolished, his horse was injured so badly it had to be killed, and he was thrown to the ground under the car. His right foot and ankle were crushed, his toes so badly as to necessitate amputation.

The court overruled motions for a directed verdict on the plaintiff's evidence and on the whole evidence. The case went to the jury, who found for the plaintiff. A motion for a new trial was made and denied. The errors relied on are:

(1) The court should have directed a verdict.

Digitized by Google

(2) There was error in the charge of the court.
(3) The verdict was against the weight of the evidence.

1 and 3 may be considered together. Plaintiff offered evidence which, if believed, should carry the case to the jury. *Chauvin* v. *Railway*, 135 Mich. 85 (97 N. W. 160); *Ablard* v. *Railway*, 139 Mich. 248 (102 N. W. 741).

2. Was there error in the charge of the court? That part of it which is most criticised reads:

"It was the duty of the motorman operating the approaching car, when the plaintiff was crossing in full view, so as to avoid a collision with him—to operate the car so as to avoid a collision with him, if possible. If you find that the motorman of the car coming from the west did not do so, and by reason thereof collided with and injured the plaintiff, then I charge you that the defendant company, through the acts of its agent was guilty of negligence."

Counsel for appellee in reply to the criticism say:

" 'The charge of a court to a jury must be considered as a whole, not by isolated sentences, and a jury, as one of the tribunals of the country, must be presumed to have some sense. It is not allowable, in reviewing instructions to the jury, to consider particular sentences or phrases as if they were independent, but they must be construed with their context.' *Welch* v. *Ware*, 32 Mich. 78.

" 'The charge to the jury is to be construed together as a whole, and where a portion of it is complained of, which, standing alone, would bear a construction that might mislead the jury, the objection will not be sustained if, when considered with the rest of the charge, the jury would not be likely to put such a construction upon it, or to be misled by it.' "

—citing many cases, and insist the jury was not misled.

One trouble with this contention is that there is nothing in the other portions of the charge upon which to base it. The charge was quite long, and fully and

Digitized by Google

carefully stated the rights and duties of the plaintiff; but we have quoted all it said as to the duty of the motorman. We think it held him to a higher degree of care than the law demands and may have misled the jury. See *Rascher* v. *Railway Co.*, 90 Mich. 413 (51 N. W. 463, 30 Am. St. Rep. 447); *Chauvin* v. *Railway*, 135 Mich. 85 (97 N. W. 160); *Ablard* v. *Railway*, 139 Mich. 248 (102 N. W. 741).

The judgment is reversed, and a new trial ordered.

BROOKE, C. J., and KUHN, STONE, OSTRANDER, BIRD, and STEERE, JJ., concurred.

The late Justice MCALVAY took no part in this decision.

WILLIAMS *v.* LAWSON.

DEEDS—BUILDING RESTRICTIONS—NOTICE—INJUNCTION—EQUITY.

Where there were no restrictions in any of the title deeds to the lot defendant purchased, on the north side of a street, and he had no notice that the residents on the south side were restricted or considered the street a restricted district, and he was assured, if he bought the lot, he would have a perfect right to put up an apartment house, equity will not enjoin the building of a brick two-story four-family apartment house.

Appeal from Wayne; Van Zile, J. Submitted June 25, 1915. (Docket No. 88.) Decided September 28, 1915.

Digitized by Google

Bill by George E. Williams and others against George A. Lawson and another for an injunction restraining defendants from erecting an apartment house in an alleged restricted residence district. From a decree for defendants, complainants appeal. Affirmed.

Robert E. Barber and *Edwin S. Bartlett,* for complainants.

N. Calvin Bigelow, for defendants.

The following cases were cited by complainant: *Schadt* v. *Brill,* 173 Mich. 647 (139 N. W. 878, 45 L. R. A. [N. S.] 726); *Allen* v. *City of Detroit,* 167 Mich. 464 (133 N. W. 317, 36 L. R. A. [N. S.] 890); *Tallmadge* v. *Bank,* 26 N. Y. 105; *Lewis* v. *Gollner,* 129 N. Y. 227 (29 N. E. 81, 26 Am. St. Rep. 516); *Watrous* v. *Allen,* 57 Mich. 362, 367 (24 N. W. 104, 58 Am. Rep. 363); *Stott* v. *Avery,* 156 Mich. 674 (121 N. W. 825); *Jenks* v. *Pawlowski,* 98 Mich. 110 (56 N. W. 1105, 22 L. R. A. 863, 39 Am. St. Rep. 522); *Tillotson* v. *Gregory,* 151 Mich. 128 (114 N. W. 1025); *Bagnall* v. *Young,* 151 Mich. 69 (114 N. W. 674); *Harris* v. *Roraback,* 137 Mich. 292 (100 N. W. 391, 109 Am. St. Rep. 681); *James* v. *Irvine,* 141 Mich. 376 (104 N. W. 631); *Misch* v. *Lehman,* 178 Mich. 225, 228 (144 N. W. 556); *Moore* v. *Curry,* 176 Mich. 456 (142 N. W. 839); *Frink* v. *Hughes,* 133 Mich. 63 (94 N. W. 601); *Silberman* v. *Uhrlaub,* 102 N. Y. Supp. 299 (116 App. Div. 869).

For defendant the following cases were cited: *James* v. *Irvine,* 141 Mich. 376 (104 N. W. 631); *Frink* v. *Hughes,* 133 Mich. 63 (94 N. W. 601); *Easterbrook* v. *Society,* 85 Conn. 289 (82 Atl. 561, 41 L. R. A. [N. S.] 615).

MOORE, J. Complainants in this bill, more than 30 in number, are residents and property holders on Grand avenue west in the village of Highland Park. This street runs from Woodward avenue west to Hamilton boulevard.

Defendant John Campbell is the owner of lot 8 in block 1 of Grand avenue subdivision, and defendant George A. Lawson is a contractor. Lot 8 is on the

Digitized by Google

north side of the street. The lots on the south side of the street have the following restriction:

"Dwelling houses erected on the south one-half of W. H. Davison's subdivision of park lot 2 in south part of quarter section 5 shall be at least two stories high and cost not less than $2,250 between Woodward and Second avenues, and not less than $2,000 between Second avenue and Hamilton boulevard, and shall be not less than 20 feet from the front line of said lots."

It is the claim of complainants that the street is a residential street, and the bill is filed to enjoin defendants from putting up a two-story, brick, four-family apartment house 20 feet from the front line of the street. After a full hearing of the case, it appearing there were no building restrictions in any of the deeds resulting in defendants' title, and no parol agreement to which the defendants were parties, the chancellor dismissed the bill of complaint. The case is brought here by appeal.

We quote from the brief of appellants:

"The contentions of complainants are:

"*First.* That restrictive covenants of record and in parol are binding upon the property of defendants and upon the defendants, and limit the use of the property to the restrictions claimed.

"*Second.* That a general plan has been maintained and recognized by all owners in the subdivision, and followed out, and that rights have accrued to complainants and all other owners of property in the subdivision, which the defendants may not disregard in the use of their property.

"*Tnird.* That defendants are bound by the provisions of a universally recognized plan, of which they had notice before purchase, and must be bound by that plan in the use of their property.

"*Fourth.* That the violation of such a plan, to the injury of complainants, would constitute a nuisance, and may be enjoined."

There is no dispute about what is shown by the record. None of the title deeds to the lot in question

Digitized by Google

show any restrictions. Defendants both testify that when they entered into a contract for the purchase of the lot they had no knowledge that it was claimed the street was a restricted one, and that they were assured, if they bought the lot, they would have a perfect right to put up an apartment house.

The solicitor for the complainants on the oral argument admitted that, if defendants were enjoined from their contemplated action, this court would have to go one step further than it has ever gone. He thought it would be justified in doing so by the case of *Tallmadge* v. *Bank*, 26 N. Y. 105. An examination of that case will show it is easily distinguishable from the instant case, in that the owner of the land had prepared a map of the street and lots. We quote:

"Davis made a map of the street between the Second and Third avenues, in which the street was shown as 76 feet wide, 8 feet being added on each side. He called the avenue, thus widened, 'St. Mark's Place.' This was before he sold or built on any of the lots. Soon thereafter, in conformity with this plan, Davis erected 16 dwelling houses on the south side of the street, and 13 on the north side. They were of a superior class, all upon one uniform line, 8 feet back from the original line of the street—the 8 feet being devoted to doorsteps and areas inclosed in iron fences. When Davis sold any of the houses or lots, he exhibited this plan to the purchasers, and represented to all who had purchased that the street was always to remain as laid out, and that, when he so formed and laid out the street and built thereon, he gave up and dedicated the strip of 8 feet of land on each lot to be used as a part of the Place in the manner it has since been used."

The court found defendant bought with notice of the plan and restrictions, and that the original purchasers had verbally agreed to and executed a plan for the improvement of the Place, and were bound to adhere to it, and the defendant, purchasing with notice, took subject to the same equity.

Digitized by Google

The subject of building restrictions has been before this court many times. A citation of the cases may be found in the briefs of the solicitors. Of all the cases decided by this court, the one most like the one now before us is the case of *James* v. *Irvine*, 141 Mich. 376 (104 N. W. 631), in which Justice GRANT, speaking for the court, said:

"Restrictions in deeds will be construed strictly against the grantors and those claiming to enforce them, and all doubts resolved in favor of the free use of the property. 11 Cyc. pp. 1077, 1078. The principle governing restrictions of this character is not in doubt. The question is ably discussed in *De Gray* v. *Club House Co.*, 50 N. J. Eq. 329 [24 Atl. 388]. The court, after a full discussion of the principle and the authorities, so clearly states the law (50 N. J. Eq. at page 340, 24 Atl. at page 392) that we quote it:

"'The law, deducible from these principles and the authorities applicable to this case, is that where there is a general scheme or plan, adopted and made public by the owner of a tract, for the development and improvement of the property, by which it is divided into streets, avenues, and lots, and contemplating a restriction as to the uses to which buildings or lots may be put, to be secured by a covenant embodying the restriction to be inserted in each deed to a purchaser, and it appears, by writings or by the circumstances, that such covenants are intended for the benefit of all the lands, and that each purchaser is to be subject to and to have the benefit thereof, and the covenants are actually inserted in all deeds for lots sold in pursuance of the plan, one purchaser and his assigns may enforce the covenant against any other purchaser and his assigns, if he has bought with knowledge of the scheme, and the covenant has been part of the subject-matter of his purchase.'

"See, also, *Sharp* v. *Ropes*, 110 Mass. 381; *McMurtry* v. *Investment Co.*, 103 Ky. 308 [45 S. W. 96, 40 L. R. A. 489]; *Sonn* v. *Heilberg*, 38 App. Div. 515 [56 N. Y. Supp. 341]; *Summers* v. *Beeler*, 90 Md. 474 [45 Atl. 19] 48 L. R. A. 54 [78 Am. St. Rep. 446]."

There is nothing in the deeds or in the knowledge

Digitized by Google

possessed by the defendants that would justify the injunction desired.

The decree is affirmed, with costs.

BROOKE, C. J., and KUHN, STONE, OSTRANDER, BIRD, and STEERE, JJ., concurred.

The late Justice MCALVAY took no part in this decision.

CITY OF NORTH MUSKEGON v. RODGERS.

1. MUNICIPAL CORPORATIONS—PARKS—NORTH MUSKEGON CHARTER —CITIES.

   The provisions of the charter of North Muskegon (sections 3, 13, chap. 6, Act No. 466, Local Acts 1895) authorizing the city to "provide" parks, and to "take, accept and hold" real estate for any purpose connected with parks, are sufficient to authorize the city to purchase land for a public park.

2. TAXATION—TAX DEEDS—MUNICIPAL CORPORATIONS—POWER TO PURCHASE AT TAX SALE.

   Where a city is authorized to buy land for park purposes, and there is nothing in its charter forbidding its purchasing property at a tax sale, and the evidence showed the purchase of property by complainant city at a tax sale for park purposes, that the sale was reported to the court and duly confirmed, that the State authorities recognized the validity of the sale and issued a deed, that notice was duly served upon defendant, who took no steps to redeem, that there is no claim on the part of defendant that the taxes were paid or the property exempt, and that more than five years had elapsed after confirmation before filing the bill, the sale will be *held* valid, and the cloud removed from complainant's title.

Digitized by Google

Appeal from Muskegon; Sullivan, J. Submitted June 30, 1915. (Docket No. 73.) Decided September 28, 1915.

Bill by the city of North Muskegon against Lincoln Rodgers for the purpose of confirming in complainant title to land purchased at tax sale. From a decree for complainant, defendant appeals. Affirmed.

Cross, Vanderwerp, Foote & Ross, for complainant.

Simpson & Anderson, for defendant.

MOORE, J. This is a bill to quiet the title to land acquired by the complainant city for park purposes at a tax sale. From a decree in favor of the complainant the case is brought here by appeal.

The questions involved are stated by the solicitors for the defendant to be:

(1) Has complainant power to purchase lands for park purposes?

(2) Can complainant become the purchaser of land at a tax sale?

(3) Is complainant's deed to the land in question void?

(4) Does the confirmation of sale preclude defendant from questioning complainant's title where the sale and deed are void?

(5) If complainant's deed is void, is defendant estopped from questioning its validity?

(6) Must not a purchaser of land under tax proceedings serve notice of redemption on all grantees named in recorded tax deeds purporting to convey a portion or portions of the land, regardless of the validity of such tax deeds?

As to the last-named question it may be said that the tax deeds to which counsel refer did not cover the lands involved here. An answer to questions 1, 2, and 4 will take care of all the questions involved.

The property in question is vacant property, and

Digitized by Google

lies between Muskegon Lake and Bear Lake, about midway between the city corporate limits east and west. In the month of April, 1908, the council of the city of North Muskegon by resolution took action authorizing the purchase of the property to be used for public park purposes. Soon after the passage of this resolution the property was purchased for $43.44 by the city at the county treasurer's sale on May 9, 1908, for the taxes of 1905. The sale was reported to the court in due time, and no objections were filed thereto. The sale was duly confirmed. No redemption of the property having been made, a deed was issued to the complainant on May 18, 1909, by the auditor general. After the deed was issued, complainant caused an examination to be made of the records in the office of the register of deeds, and obtained the information that the grantee under the last recorded deed in the regular chain of title to the land in question was the defendant, that there were no recorded tax deeds issued by the auditor general covering the land, and that there were no undischarged recorded mortgages. A notice of redemption was served on the defendant by the sheriff on June 4, 1909, and proof of such service filed with the register in chancery on June 4, 1909. Defendant failed to redeem after receiving this notice. He also failed to take any steps to set aside the tax title, although he knew that the property was being taxed right along. May 4, 1909, a certificate of purchase was issued to the city of North Muskegon for the taxes of 1906, $354.45; and the city also paid taxes for 1907, $54.96; for 1908, $49.24; and for 1909, $29.12. After defendant failed to redeem the land, it was placed upon the several tax rolls as exempt property which was owned by the city. With this brief statement of facts we may approach the questions presented by counsel:

1. Has complainant power to purchase lands for park purposes?

Digitized by Google

The charter provisions are contained in subdivision 32 of section 3 of chapter 6, and section 13 of chapter 6 of said act (Act No. 466, Local Acts 1905). Subdivision 32 of section 3 reads as follows:

"To provide for public squares and parks, and make grades and improve the same, and all grounds in said city belonging to or under the control of the corporation, and to control and regulate the same consistently with the purposes and objects thereof."

Section 13 of chapter 6 reads as follows:

"The city of North Muskegon shall have power to take, accept and hold any real or personal estate, whether by gift, bequest or devise for any purpose connected with parks, cemeteries or public grounds of said city, or for any public institution or charity, and when accepted it shall be the duty of the common council to use and appropriate the same for the uses and purposes mentioned in the instrument giving, granting or devising the same, and for no other purpose."

The city is also authorized by subdivision 45 of section 3 of chapter 6 to purchase land for cemetery purposes.

Counsel argue that city charters must be strictly construed, and no powers can be inferred, citing *Schneider* v. *City of Detroit*, 72 Mich. 242, 247 (40 N. W. 329, 2 L. R. A. 54), and hence the city may not purchase land. We think this too narrow a construction to put upon the language, "To provide for public squares and parks." In *State, ex rel. Means* v. *City of Hiawatha*, 53 Kan. 477 (36 Pac. 1119), it was held that a provision "to provide" authorized a purchase. In *Swartz* v. *Board of Commissioners of Lake County*, 158 Ind. 141 (63 N. E. 31), the court, in construing a statute providing that the board of county commissioners of Lake and La Porte counties should "provide" a suitable and convenient place for the holding of the superior court, said:

Digitized by Google

"The language employed in the section in question is peremptory, and the duty of the board to provide a suitable and convenient place at the city of Hammond for the use of the court and its officials is clearly and expressly enjoined, without any limitation or specific direction as to the means to be employed by the board in the performance thereof. What did the legislature intend by the use of the term 'provide'? Webster's International Dictionary defines the word as follows: 'To procure as suitable or necessary'; 'to prepare'; 'to make ready for future use'; 'to furnish'; 'to procure beforehand.' The definition in the Century Dictionary is 'to make ready'; 'to prepare'; 'to furnish or supply.' It is evident, then, that when the meaning of the term in question as employed in the statute is considered, it becomes manifest that the legislature intended to leave the question as to how the duty imposed should be performed to the wisdom and sound discretion of the board, and that the latter, in the exercise of its power, if it deemed proper, might either lease some suitable house for the use of the court and its officials, or it might, at the expense of the county, purchase a site and erect or construct thereon a suitable and convenient house or building for the use and purposes mentioned in the statute."

In *Bloss* v. *Board of Supervisors of Jackson County*, 170 Mich. 607 (136 N. W. 589, Am. & Eng. Ann. Cas. 1914A, 1191), it was contended that, while an organized county might purchase and hold real estate for the use of the county, as the county was the creature of the legislature, it could exercise only such powers as had been conferred upon it, and that it could not hold real estate devised to it by will; but this court held such a devise was valid. See, also, *Penny* v. *Croul*, 76 Mich. 471 (43 N. W. 649, 5 L. R. A. 858). It is a fact of which we may well take notice that cities and villages are very generally acquiring and adorning public spaces called public squares and parks. It is a practice to be commended and encouraged.

2 and 4. Can complainant become the purchaser of

Digitized by Google

land at a tax sale? If not, can defendant question this proceeding?

The contention of counsel is:

"A municipal corporation, in the absence of any enabling statute, has no authority at law to become the purchaser of land at a tax sale and acquire a title by complying with the statute in respect to such sales. The general power to buy and hold real estate does not authorize such a purchase."

The cases are not in harmony. Counsel do not call our attention to any case on all fours with the instant case. We have already shown that the complainant was authorized to purchase land for park purposes. In 20 Am. & Eng. Enc. Law (2d Ed.) p. 1185, it is said:

"Municipal corporations may acquire such property as they have the right to possess in any lawful manner, in the absence of charter provision restricting or prescribing a particular mode. They may lease, take by devise or bequest, or purchase on credit, if such power is not denied or restricted by some charter or statute provision."

See *Kellar* v. *Wilson*, 90 Ky. 350 (14 S. W. 332).

Section 70 of the general tax law provides the manner of sale and who may become purchasers. There is nothing in the charter of the city which in terms forbids its purchasing property at a tax sale for park purposes. It made this purchase in 1908 for the express purpose of establishing a park. The sale was reported to the court. No objections were filed to it. It was duly confirmed. Later the city paid large amounts for taxes, and the land was listed as exempt because owned by the city, thus escaping taxation. The defendant, in June, 1909, was notified of the purchase by the city, and has taken no steps to redeem, and does not now offer to pay what the land should have paid in the way of taxes. The State recognized the regularity of the bid and issued its deed.

Digitized by Google

Section 70 of the tax law provides in part as follows (1 Comp. Laws, § 3893; 1 How. Stat. [2d Ed.] § 1839):

"All sales shall stand confirmed, subject to the right of redemption provided for in section seventy-four, unless objections thereto are filed within eight days after the time limited for filing such report, without the entry of an order or further notice. The practice with reference to setting aside such sales shall be the same, so far as applicable, as in a sale in equity on the foreclosure of mortgages: *Provided,* no sale shall be set aside for inadequacy of price, except upon payment of the amount bid upon such sale, with interest and costs: *Provided further,* that no sale shall be set aside after confirmation, except in cases where the taxes were paid, or the property was exempt from taxation. In such cases the owner of such lands may move the court at any time within one year after he shall have notice of such sale to set the same aside, and the court may so order upon such terms as may be just."

See *Rumsey* v. *Griffin,* 138 Mich. 413 (101 N. W. 571); *Blondin* v. *Griffin,* 133 Mich. 647 (95 N. W. 739); *Burns* v. *Ford,* 124 Mich. 274 (82 N. W. 885); *Berkey* v. *Burchard,* 119 Mich. 101 (77 N. W. 635, 79 N. W. 908); *Spaulding* v. *O'Connor,* 119 Mich. 45 (77 N. W. 323); *Harrington* v. *Dickinson,* 155 Mich. 161 (118 N. W. 931); *Jenkinson* v. *Auditor General,* 104 Mich. 34 (62 N. W. 163).

We are expressing no opinion about whether a city can, without any proper public purpose to be served, become a bidder at tax sales; but when a given piece of property is desired by a municipality for a public park, and it is offered for sale at a tax sale, and the city becomes a purchaser, and the facts are reported to the court, and the sale is confirmed, and the State authorities recognize the validity of the sale and issue a deed and all the other facts disclosed by this record appear, we think it would be very inequitable to hold the deed invalid. There is no pretense on the part of the defendant that the taxes were paid, or that the

Digitized by Google

property was exempt from taxation. More than five years elapsed after confirmation before this bill was filed. We think, under these circumstances, the sale should not be invalidated, and that the cloud should be removed from the purchaser's title.

The decree is affirmed, with costs.

BROOKE, C. J., and KUHN, STONE, OSTRANDER, BIRD, and STEERE, JJ., concurred.

The late Justice MCALVAY took no part in this decision.

AUSTIN *v.* KNELL.

1. CARRIERS—DELIVERY—CONVERSION.
   In a suit against the consignees and the carrier for the conversion of a car load of hair, where the consignees refused payment on the ground that they never received the goods, and the railroad company claimed that the car was placed on consignees' siding on April 22d, that on April 24th it was about three feet from the receiving door of consignees' plant, that it had not then been unloaded, and that on April 25th it was in the same place and empty, evidence *held*, to justify a verdict against the consignees and in favor of the railroad company.

2. CUSTOMS AND USAGES—CARRIERS—DELIVERY—EVIDENCE.
   Evidence that it was the custom of the railroad company to place car load lots, consigned to defendants, on the spur track immediately adjacent to their plant, was admissible on the question of delivery.

Error to Wayne; Codd, J. Submitted June 22, 1915. (Docket No. 26.) Decided September 28, 1915.

Digitized by Google

Trover by Joseph H. Austin and another, copartners as the Austin-Olson Company, against William F. Knell and William F. Adams, copartners as Knell and Adams, and the Michigan Central Railroad Company, for the conversion of a carload of hair. From a judgment for plaintiffs against defendants Knell and Adams they bring error. Affirmed.

Angell, Bodman & Turner, for appellants.

Selling & Brand, for appellees.

MOORE, J. Plaintiffs sued defendants in an action of trover to recover the value of a carload of hair, which was delivered to the railroad company April 19, 1912, consigned to Knell & Adams, Beaufait Station, Detroit, Mich. There does not seem to be any dispute about the carload of hair being delivered to the railroad company, which company admits that it received the hair, and claims that the car was placed on the siding immediately back of Knell & Adams' plant, and within a few feet of its building, and where it was customary for the railroad to place car load lots consigned to Knell & Adams and that Knell & Adams received the hair.

It is the further claim of the railroad company that the car was placed on Knell & Adams' siding on April 22d, that on April 24th it was about three feet from the receiving door of Knell & Adams' plant, and that the car had not then been unloaded, and that on April 25th it was in the same place and empty. Knell & Adams claim never to have received the hair. The railroad company, claiming it had delivered the hair, refused to pay for it, and Knell & Adams, claiming they had not received it, refused to pay for it.

The plaintiffs, before this suit was brought, made demand of Knell & Adams as follows:

Digitized by Google

"September 16, 1912.

"In behalf of the Austin-Olson Company, I hereby make formal demand upon you of car load of hair shipped on the account of Austin-Olson Company by Sulzberger & Sons Company to you in April, 1912, and which it is claimed by the Michigan Central Railroad was delivered to you approximately upon April 24, 1912.

"If you are unwilling to deliver the hair, we hereby claim its value, $1,120, and ask either that the hair be turned over at once or its value in money be paid over.

"This demand is made in accordance with law prior to the commencement of suit in trover against you and the Michigan Central Railroad Company for the value of said car of hair."

A similar letter was sent to the railroad company.

After all the testimony of the plaintiffs was in, defendants moved for a directed verdict. This motion was refused. After the case was closed, it was renewed, and again refused. The case was submitted to the jury, which returned a verdict in favor of the railroad company of no cause of action, and found a verdict in favor of the plaintiffs against Knell & Adams in the sum of $1,232.

The judge, at the request of the plaintiffs, submitted to the jury four questions, which, with their answers, are as follows:

(1) Did Pennsylvania car No. 515436 contain 7,000 pounds (140 bags) of motor gray curled hair, and was it properly sealed by the S. Sulzberger & Sons Company and delivered to the defendant, the Michigan Central, on April 18, 1912? Yes.

(2) Was Pennsylvania car 515436 on the Knell & Adams industrial track, directly back of Knell & Adams' plant, on the morning of April 24, 1912? Yes.

(3) Had it up to that time been unloaded? No.

(4) Was Pennsylvania car 515436 unloaded on or about April 24, 1912, by Knell & Adams, or any of their employees? Yes.

Digitized by Google

A judgment was entered upon the verdict, and the case is brought here by writ of error. Counsel for appellants argue their assignments of error under the following heads:

(1) There was no evidence to support the finding that the car load of hair had been delivered to appellants by the Michigan Central Railroad Company.
(2) There was no evidence of conversion by appellants.
(3) Admission of evidence of custom and Exhibit BB was reversible error.

1, 2. Groups 1 and 2 may be considered together. We have already stated the respective claims of the parties, including the written demands made upon the defendants. There was testimony tending to support these claims. The pivotal question in the case is: Did the plaintiffs offer evidence that warranted the jury in finding that defendants Knell & Adams received from the plaintiffs a load of hair, which they claim they never did receive, and for which they have concededly not paid? It would profit no one to repeat the evidence. A careful reading of it satisfies us there was an abundance of it to justify the verdict.

3. Was there reversible error in admitting proof of the custom on the part of the railroad company to place car load lots consigned to Knell & Adams, Beaufait Station, on the spur immediately adjacent to the Knell & Adams plant? Mr. Adams, on cross-examination, testified in part as follows:

"So far as I can remember, nearly all of our car load shipments were unloaded in our building. Our plant was located so we could only unload one car at a time. If we had two or three cars standing on the side track opposite our plant, and one was unloaded, we would shove that along, and get the other down to be unloaded at the right place, and we would push it down farther with bars. We only had one rear entrance.

"Q. You spoke yesterday about telling the trucker not to take a car load of Sulzberger hair?

Digitized by Google

"*A.* No, sir; I did not. I understood somebody did. Possibly we were receiving some stuff on the Grand Trunk, which would come down town; but we could not be trucking car loads of hair that move in on the Michigan Central. It costs us money to truck it, and costs us nothing to have a car pulled on the side track."

We think it was competent, as bearing upon the question of delivery, to show what the custom was as to consignments of car load lots. We discover no reversible error.

The judgment is affirmed.

BROOKE, C. J., and KUHN, STONE, OSTRANDER, BIRD, and STEERE, JJ., concurred.

The late Justice MCALVAY took no part in this decision.

MISHLER *v.* INTERNATIONAL HARVESTER CO. OF AMERICA.

EVIDENCE—CONTRACTS—PAROL EVIDENCE—WARRANTY—FRAUD.

In an action to recover damages for alleged fraud in the sale of a gasoline engine to plaintiff, parol evidence of conversations between plaintiff and the agent of defendant prior to and at the time the order was signed is inadmissible to vary the terms of a written contract of sale containing a warranty limiting the seller's liability to return of the purchase price in case the engine proved defective, and defendant was properly notified and given opportunity to put in good order.[1]

[1] As to right to show parol warranty in connection with a contract of sale of personalty, see note in 19 L. R. A. (N. S.) 1183.

Digitized by Google

Error to Kent; Perkins, J. Submitted June 21, 1915. (Docket No. 81.) Decided September 28, 1915.

Assumpsit by John Mishler against the International Harvester Company of America for damages for alleged false and fraudulent representations in the sale of an engine. Judgment for defendant. Plaintiff brings error. Affirmed.

C. G. Turner (*E. A. Maher,* of counsel), for appellant.

Hatch, McAllister & Raymond (*Cummins, Nichols & Rhoads,* of counsel), for appellee.

MOORE, J. This suit was commenced by declaration in June, 1914, for damages growing out of the sale of a gasoline engine. The plaintiff is engaged in the business of threshing grain, husking corn, and running a saw. He first saw the engine which is the subject of controversy at the Western Michigan State Fair. He finally bought the engine, trading an old steam engine he had as part payment. After the engine was delivered to him in the fall of 1912, some trouble developed; but he continued to use it at intervals until the latter part of March, 1914.

Upon the trial he was allowed to testify orally to the conversations between him and the selling agent prior to and at the time of the purchase. In the course of his examination it developed that the contract of purchase was in writing, which writing was produced in court and identified by the plaintiff. It was then read in evidence, and upon motion of the defendant the oral testimony in relation to the bargain was stricken out. The contract is as follows:

"ORDER FOR GAS AND GASOLINE ENGINE.

"To Babbit, Rugler & Co., Town Freeport, State Mich.:

"The undersigned, of R. R. No. 55 Twp., Bowne

Digitized by Google

P. O., County Kent, State Mich., hereby orders, subject to your approval and to all conditions of agreement and warranty printed on back of this order and made a part thereof, to be shipped on or about the —— day of at once, 191—, to Babbit, Rugler & Co. at Freeport.

"*Engine.* One 45 H. P. International tractor No. 5855 gas or gasoline engine (28 size of pulley), complete, including necessary fixtures, at price of $——, 140 ft. 7 in. 4-ply. Belting endless.

"*Attachments.* One each of the following, at the following prices:

"In consideration whereof the undersigned will receive same on arrival, will pay freight and charges thereon from Chicago, Ill., and upon delivery or tender thereof will pay to your order:

"$2,600.00 cash and executive approved notes payable to your order as follows: $700.00 due cash on delivery 1st. $550.00 due Dec. 1st, 1913. $550.00 due Dec. 1st, 1914. $800.00 due 1-16 H. tractor, 1st, 191—. Said notes to draw interest at the rate of 6 per cent. per annum from date July 1, 1913, until maturity, and 7 per cent. per annum from maturity until paid.

"It is expressly agreed that this order shall not be countermanded, and that the title to said property shall remain vested in you and your assigns, until the entire purchase price has been paid in money.

"It is expressly agreed that the property herein ordered shall be and remain personal property in whatsoever manner it may be annexed to realty.

"The undersigned hereby acknowledge having received a true copy of this order. Agreement and warranty as indorsed on the back hereof.

"*Security.* Rives steam engine and water tank.

"*Order.* Dated the 4th day of Nov., 1912.

"Purchaser lives 2 miles east, 5 miles south, of said post office.

"Approved at ——— by ———.

"Taken by Walker & B. R. & Co.

"JOHN MISHLER."

Upon the back of it appeared the following:

"WARRANTY AND AGREEMENT.

"International Harvester Company of America (Incorporated) warrants the within described engine to

Digitized by Google

do good work, to be well made of good materials, and durable if used with proper care. If upon one day's trial, with proper care, the engine fails to work well, the purchaser shall immediately give written notice to International Harvester Company of America, at Chicago, Illinois, and to the dealer from whom it was received, stating wherein the engine fails, shall allow a reasonable time for a competent man to be sent to put it in good order, and render necessary and friendly assistance to operate it. If the engine cannot then be made to work well, the purchaser shall immediately return it to said dealer, and the price paid shall be refunded, which shall constitute a settlement in full of the transaction.

"Use of the engine after three days, or failure to give written notice to said company and said dealer, or failure to return the engine as above specified, shall operate as an acceptance of it and a fulfillment of this warranty. No agent has power to change the contract of warranty in any respect.

"This express warranty excludes all implied warranties, and said company and said dealer shall in no event be liable for breach of warranty in an amount exceeding the purchase price of the engine. If within 90 days' time any part proves defective, a new part will be furnished on receipt of part showing defect."

After the motion to strike out was granted, counsel for plaintiff said, "Under the circumstances we have no further testimony," and the trial judge directed a verdict for the defendant. The case is brought here by writ of error.

The pivotal question in the case is whether the written contract should control. Counsel for appellant insist that the oral testimony was competent, and the case should have been submitted to the jury, citing in support of this contention *Phelps* v. *Whitaker*, 37 Mich. 72; *Peck* v. *Jenison*, 99 Mich. 326 (58 N. W. 312); *Lyon* v. *Lindblad*, 145 Mich. 588 (108 N. W. 969); and *J. B. Millet Co.* v. *Andrews*, 175 Mich. 350 (141 N. W. 578). A reading of those cases will show them distinguishable from the instant case in the particular

Digitized by Google

that the contracts in those cases originated in fraud. The case now before us is more like *Seitz* v. *Machine Co.*, 141 U. S. 510 (12 Sup. Ct. 46); *McCray Refrigerator, etc., Co.* v. *Woods*, 99 Mich. 269 (58 N. W. 320, 41 Am. St. Rep. 599); *Detroit Shipbuilding Co.* v. *Comstock*, 144 Mich. 516 (108 N. W. 286); and the recent case of *Witteman Co.* v. *Malting & Brewing Co.*, 183 Mich. 227 (150 N. W. 109). We think these cases are controlling.

The judgment is affirmed.

BROOKE, C. J., and KUHN, STONE, OSTRANDER, BIRD, and STEERE, JJ., concurred.

The late Justice MCALVAY took no part in this decision.

GRAND RAPIDS & INDIANA RAILWAY CO. *v.* MICHIGAN RAILROAD COMMISSION.

1. CARRIERS—PETITIONS—RAILROAD COMMISSION—NAVIGATION COMPANIES—ESTABLISHING ROUTES.

   Navigation companies are within the class entitled, under Act No. 300, Pub. Acts 1909, to make complaint to the Michigan Railroad Commission praying for the establishment of through routes and joint rates for passengers upon railroads between designated points, and the fact that the commission has no jurisdiction over water lines is immaterial.[1]

2. SAME—APPEAL AND ERROR—ORDERS.

   Where the conclusion arrived at by the commission is justified by the testimony, this court will not, on appeal, substitute its judgment for that of the commission.

[1] As to delegation to railroad commissioners of power to regulate carriers, see note in 32 L. R. A. (N. S.) 639.

Digitized by Google

3. SAME — RAILROAD COMMISSION — INJUNCTION — ESTABLISHING ROUTES AND RATES.

In proceedings by a railroad company for the vacating of an order issued by the Michigan Railroad Commission for the establishment of through routes and joint rates by complainant and another railroad between points on both lines, where complainant's line, after reaching a certain point, runs nearly at right angles to the other railroad, and does not originate its traffic in the same general territory as the other road, the order of the commission will not be set aside on the ground that there is already a satisfactory route through the same territory.

Appeal from Kent; McDonald, J. Submitted June 18, 1915. (Docket No. 107.) Decided September 28, 1915.

Bill by the Grand Rapids & Indiana Railway Company against the Michigan Railroad Commission for the vacating of an order issued by said defendant, and other relief. Dudley E. Waters and Paul H. King, as receivers of the Pere Marquette Railroad Company, filed petition for leave to intervene as defendants. From a decree for defendants, complainant appeals. Affirmed.

James H. Campbell, for complainant.

Parker, Shields & Brown (*Seward L. Merriam* and *John C. Bills*, of counsel), for interveners.

Grant Fellows, Attorney General, and *David H. Crowley*, Assistant Attorney General, for Michigan Railroad Commission.

Boudeman & Adams, for petitioner.

BIRD, J. James B. Balch, of Kalamazoo, filed his petition with the Michigan railroad commission, praying that an order be made requiring the Grand Rapids & Indiana Railway Company and the Pere Marquette Railroad Company to establish a through route and

Digitized by Google

joint rate for passengers and baggage from Kalamazoo to Charlevoix. Subsequently the Detroit & Cleveland Navigation Company and the Northern Steamship Company filed petitions, asking that a through route and joint rate be made by complainant and the Pere Marquette from points south and east of Grand Rapids, on the Pere Marquette, to the city of Mackinaw. The applications were consolidated, and after a hearing thereon, at which the interested parties were present, the commission ordered:

"That said Grand Rapids & Indiana Railway Company and said Pere Marquette Railroad Company establish and make effective a through route and joint rate for the transportation of passengers and baggage to and from the station of Charlevoix, on the line of said Pere Marquette Railroad, and points south of the city of Grand Rapids, on the line of the Grand Rapids and Indiana Railway, with interchange at the stations of Bay View or Petoskey, *and that said Grand Rapids & Indiana Railway Company and said Pere Marquette Railroad Company establish and make effective a through route and joint rate for the transportation of passengers and baggage from points south and east of the city of Grand Rapids, on the line of the Pere Marquette Railroad, north to the station of Mackinaw City, upon the line of the Grand Rapids & Indiana Railway, with interchange at the stations of Bay View or Petoskey.*"

Complainant, being aggrieved at that part of the order which appears in italics, and which ordered it and the Pere Marquette to establish a through route to Mackinaw, filed its bill of complaint in the Kent circuit court, with the view of having it set aside as unreasonable and void. This proceeding resulted in a decree denying the relief prayed and dismissing complainant's bill. On appeal several questions are raised, which, if well taken, will affect the validity of the order.

1. It is first insisted that the commission had no

Digitized by Google

jurisdiction to make that part of the order which requires it to establish a through route and joint rate from points on the Pere Marquette to Mackinaw City. It is asserted that the commission can act only on complaint, and that there was no valid complaint before the commission which would justify that part of the order. The part of the order objected to depends for jurisdiction upon the petitions of the Detroit & Cleveland Navigation Company and the Northern Steamship Company, and it is argued that the Michigan railroad commission has no jurisdiction of boat lines, and therefore their petitions are of no force; that they are the same as no petitions.

Section 22 of the Michigan railroad act (Act No. 300, Pub. Acts 1909) points out who may make complaint:

"Upon the complaint in writing of any person, firm or corporation or association, or of any mercantile, agricultural or manufacturing society, or any body politic or municipal organization. * * *"

Both of these navigation companies are within the class mentioned in this provision, and it is of no importance that the commission has no jurisdiction over their business or over water rates. They are corporations. This fact gives them the right to make complaint. The business they are engaged in is immaterial, so far as their right is concerned to make complaint to the commission. The hearing disclosed, however, that they have an interest in having the railroads join in this through route and joint rate. This point we think is without merit.

2. The second contention is that the commission was without authority to make the order, because it was shown that there was at the date of the hearing a satisfactory through route from Grand Rapids to Mackinaw. The argument that complainant's counsel makes on this question is open to criticism, in that it is based upon a wrong premise. His argument assumes

Digitized by Google

that the order was made to apply to Grand Rapids, whereas an examination of it will show that it was not made to apply to Grand Rapids but made to apply to points on the Pere Marquette south and east of Grand Rapids to Mackinaw. So, then, the question which the commission really considered and decided was, not whether there was a satisfactory through route from Grand Rapids to Mackinaw City, but whether there was a satisfactory through route between Mackinaw City and points on the Pere Marquette south and east of Grand Rapids. Testimony was offered before both the court and commission bearing on this question. The train schedules of both roads were introduced, and explanatory testimony of the operation of trains was given by those having them in charge. The question was one of fact, and the testimony before the commission was sufficient to support the conclusion reached. If the conclusion arrived at by the commission finds justification in the testimony, this court will not substitute its judgment for that of the commission. *Interstate Commerce Com'n* v. *Railroad Co.*, 227 U. S. 88 (33 Sup. Ct. 185); *Detroit, etc., R. Co.* v. *Railroad Com'n*, 171 Mich. 335 (137 N. W. 329).

3. The further argument is made by complainant in this connection that the question is settled in its favor by the case of *Interstate Commerce Com'n* v. *Railway Co.*, 216 U. S. 538 (30 Sup. Ct. 417); the facts of which are said to bear close analogy to the ones involved here. In that case the commission made an order establishing a through route and joint rate for passangers and baggage on the Northwestern-Union Pacific lines, beginning with Colorado points and extending as far east as Chicago, to Seattle via Portland. The line from Seattle to Portland is owned and operated by the Northern Pacific. The Federal court set aside the order of the commission, on the ground that the Northern Pacific Railway was already operating

Digitized by Google

a satisfactory route through substantially the same territory. The cardinal difference between these cases lies in the fact that in *Interstate Commerce Com'n* v. *Railway Co., supra,* the commission had established a second through route over lines which drew their traffic from the same general territory that the Northern Pacific and Burlington lines do. As is well known, the Northwestern-Union Pacific lines are parallel with those of the Burlington and Northern Pacific, while in the case before us the Pere Marquette line, after leaving Grand Rapids, runs nearly at right angles to complainant's line, and does not originate its traffic in the same general territory traversed by the complainant. In order to make the case under consideration analogous to the case cited, it would be necessary to make the Pere Marquette line parallel with complainant's, with both drawing traffic from competitive territory.

We are all of the opinion that the commission, not only had jurisdiction in the premises, but was acting within its authority in making the order. The decree of the lower court is affirmed, with costs of this court to the defendants.

BROOKE, C. J., and KUHN, STONE, OSTRANDER, MOORE, and STEERE, JJ., concurred.

The late Justice MCALVAY took no part in this decision.

Digitized by Google

SOLOMON *v.* WEINER.

1. NAMES—FICTITIOUS NAMES—STATUTES—SET-OFF AND RECOUPMENT.

In an action to recover a claimed balance due for goods sold and delivered, where defendant admitted that he had not complied with the provisions of Act No. 101, Pub. Acts 1907, relative to persons doing business under an assumed or fictitious name, the trial court properly limited defendant's recovery by way of set-off to what was necessary to wipe out plaintiff's claim.

2. SALES—CONTRACTS—MEASURE OF DAMAGES.

Where plaintiff sold defendant scrap iron at a fixed price per ton and defendant objected to receiving certain castings because they were too heavy to handle, whereupon plaintiff instructed him to return them if he did not want them at the contract price, but instead of doing so he kept them and later sold them, the measure of damages was the contract price, and the trial court was in error in instructing the jury that defendant should account for them at what they were reasonably worth.

Error to Calhoun; North, J. Submitted June 22, 1915. (Docket No. 92.) Decided September 28, 1915.

Assumpsit in justice's court by Moses Solomon against Norman Weiner, doing business as the Albion Iron & Metal Company, for goods sold and delivered. From a judgment for defendant in justice's court, plaintiff appealed to the circuit court. Judgment for defendant. Plaintiff brings error. Reversed.

Merton Fitzpatrick and *Wilbur D. Grommon*, for appellant.

Edward R. Loud, for appellee.

Digitized by Google

BIRD, J. This suit was commenced by plaintiff to recover a balance of $70.50 which he claims was due him on certain consignments of scrap iron and waste paper sold to defendant and shipped to him at Battle Creek. The case was tried in justice's court, and afterwards on appeal in the circuit court. Judgment was denied to plaintiff in both courts. It is claimed that several errors occurred on the trial which entitle him to a retrial of the matter.

1. The defendant pleaded the general issue and gave notice thereunder of set-off and recoupment. When he attempted to establish his set-off and recoupment, he was met with the objection that he was precluded from so doing by reason of his failure to comply with the provisions of Act No. 101, Pub. Acts 1907 (2 How Stat. [2d Ed.], § 2626 *et seq.*), relative to persons doing business under an assumed or fictitious name. Defendant conceded that he had not filed the affidavit required by the act, but insisted that such failure ought not to preclude him, when sued, from establishing the fact that he did not owe the plaintiff, or that there was no debt due. The trial court agreed with him, but held that he could recover nothing by way of set-off beyond what was necessary to wipe out the plaintiff's claim. In other words, that, should the jury find a balance in defendant's favor, no judgment therefor could be rendered in his behalf. While this court has denied to those making contracts in violation of this act the right to have them enforced in the courts (*Cashin* v. *Pliter*, 168 Mich. 386 [134 N. W. 482, Am. & Eng. Ann. Cas. 1913C, 697]), we do not think the denial should go to the length of holding that, when such persons are sued, they may not show that they are not indebted as claimed. See *Robbins* v. *Vandermeiden*, 182 Mich. 674 (148 N. W. 747). It follows that the limitation fixed by the trial court upon the defendant's right to make his defense was proper.

Digitized by Google

2. Error is assigned upon the following instruction:

"Incident to the car of iron and claim of the defendant relative to the four tons of castings that were rejected, I say to you that in the first instance the defendant, especially after he received the notice from the plaintiff which has been read in your presence relative to this item, did not have the right to keep the 8,000 pounds of heavy castings. It was his duty to return them to the plaintiff under the law and evidence in this case; but, since he has kept those castings, he must now account to the plaintiff for them in the amount that they are reasonably worth, and that you should determine from the evidence in the case, it being claimed on the part of the defendant that the reasonable value of those was $7 a ton. The plaintiff claims that they should have been allowed to him at the amount of $12 a ton."

It is conceded that the contract price for the cast iron scrap was $12 per ton, but it was claimed by the defendant on the trial that there were several tons of very heavy scrap, which could not be used by the Battle Creek foundries unless it was broken up, and the breaking would cost $5 a ton. There appears to have been no such exception made in the contract. Soon after the cars arrived at Battle Creek, the defendant claims that he notified the plaintiff with reference to the shortage in weights; but no exception was taken to the heavy scrap until some time afterward, when plaintiff was urging the defendant to make payment therefor. Defendant then made this claim, and plaintiff wrote defendant in substance that, if he did not want the heavy scrap at the contract price, he could return it at his (plaintiff's) expense. In reply to this letter the defendant informed plaintiff that, if he wanted the heavy castings returned to him, he could come over to Battle Creek and load it upon the cars. Defendant did not return it to plaintiff, but later disposed of it.

Under these circumstances we think the trial court

Digitized by Google

was in error in charging the jury that the measure of damages for the heavy castings was what it was reasonably worth in the market. It was conceded by the plaintiff that the contract called for heavy scrap, and that it was to be paid for at the rate of $12 per ton. When defendant protested that it was too large to be used by the foundries, the plaintiff ordered him to return it, if he did not want it at that price. Instead of doing so, he kept it, and later sold it. Under this state of facts the defendant must be held to have accepted the heavy scrap, and, if he did, it follows that he is liable for the contract price. *Brown* v. *Harris*, 139 Mich. 372 (102 N. W. 960). See, also, *Talbot Paving Co.* v. *Gorman*, 103 Mich. 403 (61 N. W. 655, 27 L. R. A. 96); *Williams* v. *Robb*, 104 Mich. 242 (62 N. W. 352).

The other assignments of error are without merit.

The judgment will be reversed, and a retrial ordered.

BROOKE, C. J., and KUHN, STONE, OSTRANDER, MOORE, and STEERE, JJ., concurred.

The late Justice MCALVAY took no part in this decision.

JOHNSTON v. ELM COOPERAGE CO.

1. MASTER AND SERVANT—PERSONAL INJURIES—EVIDENCE—NEGLIGENCE—DIRECTED VERDICT.

In an action by an employee to recover for the loss of an arm in defendant's factory by a machine consisting of a swinging table with a circular saw working through a slit in the back and bottom which was put in operation by a

Digitized by Google

lever, evidence that during the six months plaintiff had used the machine the lever had never failed to work, that a few moments before the accident the machine was performing its proper function, that no part of the apparatus had been constructed to support a person falling or slipping on the floor, and that at the time the accident happened plaintiff was not operating the machine, but was returning from carrying away some poles he had cut, when he slipped and fell against the table, disengaging the lever, and was injured, did not show any negligent conduct of defendant, and its motion for a peremptory verdict should have been granted.

2. TRIAL—NEGLIGENCE—INSTRUCTIONS—MASTER AND SERVANT.
Where there was no evidence from which the jury could determine that the force applied by plaintiff in falling against the table was a greater strain than the device would receive in the ordinary conduct of the business, it was error for the trial court to submit that question to the jury.

3. MASTER AND SERVANT—TRIAL—INSTRUCTIONS—DUTY OF MASTER.
The trial court was in error, in submitting the question of defendant's liability to the jury, in limiting the question to the condition of the machine on the day in question and to the strain put upon it by plaintiff when he slipped and fell, as the true rule should be measured by the probability, and not the possibility, of an accident, and should be applicable in like circumstances if the device had been in use a day or a month, where an employee stumbled or fell, and, to save himself, grasped at, or fell against, machinery not up to some standard of efficiency.[1]

Error to Charlevoix; Mayne, J. Submitted June 29, 1915. (Docket No. 30.) Decided September 28, 1915. Rehearing denied April 21, 1916.

Case by Earle H. Johnston against the Elm Cooperage Company for personal injuries. Judgment for plaintiff. Defendant brings error. Reversed.

[1] For different forms of statement of general rule with respect to master's duty as to places and appliances furnished to servant, see note in 6 L. R. A. (N. S.) 602.

Digitized by Google

De Foe, Hall & Converse, and *A. G. Urquhart*, for appellant.

M. E. Silverstein (*Clink & Williams*, of counsel), for appellee.

OSTRANDER, J. Defendant introduced no testimony. That produced on the part of the plaintiff tended to prove that when injured he was 27 years old, and had worked for defendant, at its plant, from about August 1, 1911, to March 21, 1912, when he was injured by the cutting off of his right arm at the elbow. Excepting 8 weeks devoted to other duties, he had worked, most of the time, with the machinery and apparatus which inflicted the injury. This apparatus consisted of a circular saw, a swinging table, and a lever, and was used to cut the ends off of hoop poles. The swinging table, hanging from the ceiling, was about 5½ feet long, 18 inches wide, with a back 18 inches high—a platform with a raised back. In the back and floor of it was a narrow opening, or slit, to receive the saw. The lever was a piece of hardwood about 4 feet long, fastened at one end, back of the saw, by a bolt to the saw frame, or to an upright in the wall. When the table was affected by gravity only, hanging vertically from its supports, about 8 inches of the circumference of the saw showed through the slit in the back and bottom of it. In use it was pulled, or swung, forward, towards the operator, entirely free from the saw, and was held in this position by the lever, in the underside of which a notch had been cut, which would engage with the back of the table. The operator, the table being so held by the lever, laid upon it a bundle of poles, and, having arranged them, lifted the lever and pushed, or swung, the table against the saw until the poles were severed, when he swung it towards himself until the notch in the lever engaged the back of the table, when he removed, and carried away the poles. Whether the lever was always resting upon the back

Digitized by Google

of the table and engaged the back automatically is not made clear. It is inferred that the engagement was automatic, but was aided, or made certain, by the operator. It is inferred that the table was swung forward by the operator, the lever riding upon the back of it, until, having passed the notch, it was released, and was held by the notch.

Upon the occasion when he was injured, plaintiff had sawed some poles, pulled the table into the position where it was held by the lever, removed the poles, and taken them away. Returning, he slipped, why or upon what does not appear, and, in an effort to save himself from falling, caught at, or struck, or fell upon or against, the table in such manner as to disengage the lever and cause the table to swing back upon the saw, severing his arm. In the time that plaintiff had operated the table, the lever had never failed to hold it until released by the operator. But it had, when operated by others, or by another, been disengaged upon some occasions by the jar of machinery and by throwing upon the table loads of poles. The extent of the vibration caused by machinery upon such occasions, the size of the load of poles cast upon the table and how thrown down, the manner in which action of the device was secured—whether automatic or otherwise—are not explained. Long use had worn the lever, and, instead of an opening going squarely into the wood, the portion against which the back of the table rested when held by it was not flat, but was curved. Instead of an inch of lever substantially parallel with the back of the table when holding it in place, there was but about half an inch which really engaged the back of the table. It also had a lateral motion of some 5 or 6 inches, owing to the play it had upon the bolt which held it at its end.

The court submitted to the jury whether it was negligence for the defendant to continue the use of the

Digitized by Google

lever in its described condition, and instructed them that the employer could not be held to supply a device which would under any and all conditions hold the table away from the saw. Instructed them, also, in effect, that if they found that in slipping and in his effort to save himself plaintiff did not subject the table to a greater force, or jar, than it would receive in its ordinary use, plaintiff might recover. The theory of the charge is that the employer was not responsible if the weight or pressure or disturbance exerted was greater than the apparatus was intended to bear or sustain, but otherwise might be held liable. To quote:

"Now, gentlemen, one of the things in this case that you must determine is: Was this a reasonably safe machine? In other words, as it was constructed and as it stood there on the day in question, was it reasonably safe? Would it stand the strain, the jar or shock usually put upon it, and that was intended to be put upon it, and must necessarily be put upon it, in the actual running of the business, as it was actually then operated by the defendant? If it was strong enough to stand that strain, then the defendant has met its full duty in the case. If the plaintiff, when he slipped, placed an unusual or extraordinary strain, shock, or jar upon this machine—outside of and beyond that which it would receive in the actual working of each day—then he cannot recover, because the machine was subjected to a test that it was not intended to stand, beyond the working test as I have given it to you."

It will be noted that the lever and its action were simple. It was not a safety device, but a convenience, a part of the apparatus useful in operating the saw, as was the table and its supports. If the empty table was disengaged while the saw was running, no harm could result; and at the moment before plaintiff was injured the device was performing, as it had performed for the 6 months or more that plaintiff had operated the saw, its proper function. It was holding the table in position to receive another bundle or armful of poles.

Digitized by Google

Plaintiff was not injured while operating the saw. It was as though another workman had, in passing, slipped, caught the table, and been injured. No part of the apparatus had been constructed, nor was it maintained, to support a person falling, or slipping on the floor.

The motion of defendant for a peremptory instruction should have been granted. There was no evidence from which the jury could determine that the force applied to the table by plaintiff, or the blow it received, was a greater strain upon the device than those it would receive in the actual ordinary conduct and management of the business. Again, the rule given to the jury for determining defendant's liability is wrong. The rule was applied after the device had been some time in use. If it is a proper rule, it would be applicable in like circumstances if the device had been in use a day or a month. It would be applicable in any case where an employee stumbled or fell, and, to save himself, grasped at, or fell against, machinery not up to some standard of efficiency, which gave way, and so did not save him from, or did expose him to, serious injury. We said in *Schroeder* v. *Car Co.*, 56 Mich. 132, 134 (22 N. W. 220, 221):

"The fact of injury and the possibility of guarding against it do not necessarily make out a case of culpable negligence. Very few acts in life are done with such care to prevent accidents as would have been possible; and the law only requires of any one that degree of care and prudence which persons who are reasonably careful ordinarily observe."

And in *Johnson* v. *Jackson*, 168 Mich. 149, 154 (133 N. W. 945, 947), we said:

"Defendant's duty in the premises is to be measured by probabilities—not by the possibility that the lever could be released in the manner suggested by counsel, but by the probabilities that any employee in the performance of duty in the place in question would ever in such a way release the clip and the lever."

Digitized by Google

Plaintiff is most unfortunate, but his injury cannot be ascribed to the negligent conduct of his employer.

The judgment is reversed, and a new trial granted.

BROOKE, C. J., and KUHN, STONE, BIRD, MOORE, and STEERE, JJ., concurred.

The late Justice MCALVAY took no part in this decision.

ACORN REFINING CO. *v.* KNOWLSON.

1. PRINCIPAL AND AGENT—SALES—AUTHORITY OF AGENT.
   In an action for goods sold and delivered, where the bargain was made, and the goods received, during defendant's absence, by an agent who had authority to buy *some* goods, the question whether the agent was acting within his authority was for the jury.

2. SAME—RATIFICATION.
   Where the agent informed defendant that the goods were consigned upon special agreement, but the order signed was unconditional, and the agent, with defendant's consent, paid out defendant's money for apparatus the agent claimed plaintiff was to furnish, the question whether defendant ratified his agent's action was for the jury.

3. SAME—AGENT'S AUTHORITY.
   A party dealing with an agent is bound to inquire into the extent of his authority, ignorance of which is no excuse, but, having ascertained the general character or scope of the agency, he is authorized to rely upon the agent's having such powers as naturally and properly belong to such character, and, in the absence of circumstances putting him upon inquiry, is not bound to inquire for secret qualifications or limitations of the apparent powers of the agent.

Digitized by Google

4. SAME—INSTRUCTIONS—AGENT'S AUTHORITY.

Instructions to the jury so confusing and misleading as to leave in doubt the rule to be applied in determining the agent's authority to bind defendant, *held* to be erroneous.

5. SAME — HOLDING OUT BY PRINCIPAL — AGENT'S AUTHORITY — EVIDENCE.

Where there is no testimony that plaintiff or its salesman had any knowledge concerning the apparent authority of defendant's agent beyond the agent's own action and statements, and the salesman did not ascertain or inquire about the general character or scope of the agency, but acted upon the assumption that because he was willing to do business he had authority to do it, plaintiff was in no position to rely upon any holding out of the agent by defendant, since one is not affected by facts of which he has no knowledge.

6. SAME.

However, it was proper for plaintiff to prove the scope of the agent's authority, and to show that it extended far enough to authorize him to purchase a line of goods not before carried by defendant.

7. SAME—TRIAL—SPECULATION BY JURY—INSTRUCTIONS.

Where the agent was not left in full charge of the business it was erroneous for the court to allow the jury to speculate upon the question whether the particular goods, a new line, "would be handled by that kind of a concern," "whether it was a kindred business" such as defendant would expect an agent to take on, and whether "he would have authority to use his best judgment" in taking it on, in the face of undisputed testimony stating the limits of the agent's general authority.

8. SAME—RATIFICATION—INSTRUCTIONS—TRIAL—SALES.

Where defendant's agent informed him that the sale was conditional, and plaintiff claimed that it was absolute, knowledge of correspondence between the parties in which the respective claims were made, and failure to immediately repudiate the transaction would not amount to ratification, as defendant might be excused for assuming that the dispute would be settled agreeably with the agent's contention.

9. SAME.

Instructions by the court that notice to the agent was

Digitized by Google

notice to the principal, and that the correspondence, being carried on by express authority of defendant, would be such notice as to amount to ratification if he received the benefits of an unauthorized agreement, was erroneous, as defendant might have been willing to ratify a conditional sale but not an unconditional one.

10. SAME—CONSTRUCTIVE NOTICE—UNAUTHORIZED ACTS.
A principal is not chargeable with constructive notice of unauthorized acts of his agent.

Error to Kent; Brown, J. Submitted June 9, 1915. (Docket No. 23.) Decided September 28, 1915.

Assumpsit in justice's court by the Acorn Refining Company against Abram B. Knowlson for goods sold and delivered. From a judgment for plaintiff, defendant appealed to the circuit court. Judgment for plaintiff. Defendant brings error. Reversed.

Holmes & Holmes and *Don E. Minor*, for appellant.

Hatch, McAllister & Raymond, for appellee.

OSTRANDER, J. The action is brought to recover the price and value of goods sold and delivered. The principal issues made were, *first*, whether defendant's agent, between whom and an agent of plaintiff the bargain was made, was acting within his authority; *second*, whether the defendant, whatever his agent's authority may have been, ratified the agent's action and agreement. A third issue was tendered by defendant, which was that defendant's agent was by fraud, practiced by plaintiff's agent, induced to make a bargain. Suit was begun in justice's court, where the pleadings were oral, and plaintiff recovered.

Whatever the bargain was, it was made and the goods were received during a period when for several weeks defendant was absent. During his absence his business went on. Mr. Abram B. Horner, an employee, attended to the correspondence, and had authority to

Digitized by Google

buy *some* goods. Defendant returned the last of June, and was informed by Horner about the particular transaction; but defendant says his agent told him the goods were consigned upon a special agreement, the terms of which he stated.

The order for the goods, dated May 19, 1911, signed "A. B. Knowlson, per A. B. Horner," is unconditional. The invoice indicated an unconditional sale. Correspondence followed the receipt of the goods conducted for defendant by Horner. Horner paid out some of defendant's money to supply apparatus which he claimed plaintiff was to furnish, which purchases for its account plaintiff, in a letter, approved. It was when plaintiff demanded pay that Horner, using defendant's name, wrote it that the goods were consigned, to be paid for when sold and money for sales collected.

The controlling issues are really very narrow. The order for the goods, upon which plaintiff acted, contains the following:

"This order is placed with the understanding that it is positive, and not subject to change or countermand unless so specified hereon. Any agreement not stated on this order will not be recognized."

If defendant had given it, and had thereafter received and accepted the goods, there would be no question about his liability to pay for them. Plaintiff had notice that defendant's agent gave the order. If the agent had authority to purchase the goods, if he was held out by his principal as having such authority, or if the principal, the defendant, ratified his action, defendant's liability would be clear. Plaintiff undertook to prove both authority and ratification. Upon neither point is the testimony conclusive; but there is sufficient, in my opinion, to warrant submitting these questions to a jury. This the court did, but in a manner criticized by defendant's counsel. Rulings admitting and rejecting testimony are also complained about, and

Digitized by Google

it is assigned as error that the court withdrew from the jury the question of fraud in procuring the contract.

We said, through Mr. Justice BLAIR:

"Defendant's counsel contends that a party dealing with an agent is bound to inquire into the extent of his authority, ignorance of which is no excuse. This is undoubtedly a correct statement of a general principle of the law of agency, but this rule is not to be applied without qualifications and under all circumstances. It is equally well settled that, having ascertained the general character or scope of the agency, the party is authorized to rely upon the agent's having such powers as naturally and properly belong to such character, and, in the absence of circumstances putting him upon inquiry, is not bound to inquire for secret qualifications or limitations of the apparent powers of the agent." *Grand Rapids Elec. Co.* v. *Manfg. Co.*, 142 Mich. 4, 9 (105 N. W. 1), citing *Inglish* v. *Ayer*, 79 Mich. 516 (44 N. W. 942); *Allis* v. *Voigt*, 90 Mich. 125 (51 N. W. 190); *Austrian & Co.* v. *Springer*, 94 Mich. 343 (54 N. W. 50, 34 Am. St. Rep. 350).

The errors assigned upon the charge are best understood by setting out some parts of it:

"A good deal has been said in this case on the subject of the authority of an agent, the subject of apparent authority and real authority. You will find in some instances that the court holds, and it is the law as pertaining to the facts in this case, that apparent authority, that which seems to be obvious or evident from the relation of the clerk to the business of the principal, that if he holds himself out and seems to be in a position of having apparent authority to do what he is trying to do and does do, that the principal is bound by that authority. On the other hand, you will find decisions that hold that a person dealing with an agent does so at his peril and that he must inquire and must learn the extent of the agency, and the right of the agent to make the purchase in order to bind the defendant.

"Now under proper circumstances the apparent authority binds the principal under some conditions. On

Digitized by Google

the other hand, there are cases that the deal is absolutely at the peril of the person negotiating the deal with the agent, and it is the facts and circumstances in the case that give application to those rules of law. And in this case, when you are determining the question of agency of Mr. Horner, you will consider the nature of the business, you will consider his agency there, and take all the testimony in the case, that of Mr. Knowlson, whatever you find that he did from the testimony here, whatever admissions he may have made; and on that subject the statements or claims of Mr. Horner as to what his authority was, of course, are not admissible, because the agent cannot by his declaration bind his principal, but the fact of his occupancy there, his labor there, what he had to do there, from the nature of his employment there, all those things may be taken into consideration by you as to whether or not he had the authority to negotiate this deal. The apparent authority, the fact that the defendant in this case had gone away for some considerable length of time and left this man there in charge of the business, with authority to buy certain kinds of goods, the fact as to whether or not these goods bought were goods that came in in the regular course of business and would be handled in that kind of a concern, whether it was a kindred business, such a business as Mr. Knowlson himself would expect an agent to take on, and there would be an implied understanding between them, if not an express understanding, that in anything like this he would have authority to use his best judgment in indorsing it and taking it on. All the facts and circumstances in this case you will consider as bearing on the agency or the right of Horner to make this contract in the name of this defendant, so as to bind him, and that, of course, that agency or that right, must appear from the testimony which preponderates in favor of the plaintiff, as I have stated on opening this case to you."

The jury was further instructed:

"In this case the plaintiff claims to have entered into the agreement with the defendant through one Mr. Horner, acting for and in behalf of the defendant. Upon this point I charge you that one claiming to deal with and through an agent is bound to ascertain the

Digitized by Google

authority of the agent to bind his principal in any given transaction. In other words, he deals with the agent at his peril, and the burden rests with the plaintiff to show that the agent had authority to bind his principal in the matter. And, applied in this case, I charge you that the burden is upon the plaintiff to show by a preponderance of the evidence that Mr. Horner, with whom the contract was negotiated, had authority from the defendant, Mr. Knowlson, to enter into such a contract as plaintiff claims was entered into in this case for and in behalf of the defendant. * * *

"Upon the question of the authority of an agent in the given case, I charge you that agents may have as much or as little power as their principals see fit to give them, and one dealing with an agent is bound to inquire into the extent of his authority, and a person who deals with another supposing him to be the agent is not protected by the other's assumption to act.

"I further charge you that the statement of conclusions of the agent that he has the authority to act in a given case are not sufficient to prove authority, and such declaration is not binding upon his principal. * * *

"A definition as to the agency of one person by another may be stated as follows: It is a contract, either expressed or implied, by which one of the parties confides to the other the management of some business to be transacted in his name or on his account, by which the other assumes to do the business and surrender an account of the business done. And on the question of agency it is said that where a person is sought to be charged for the acts of another, and there is evidence of an apparent authority, the question to be determined is, not what power was intended to be given to the agent, but what power a third person dealing with him had the right to infer from his own acts and those of his principal that he possessed."

Before these instructions were given, the court had advised the jury upon the same general subject in the following language:

"On the question of implied authority I charge you as a matter of law that the authority of an agent need not be expressly conferred, but may exist by implica-

Digitized by Google

tion from the general authority conferred by the principal, and I charge you that, if it appears from the evidence in this case that Mr. Horner had such general authority during the absence of Mr. Knowlson as would reasonably include such a purchase as has been made in this case, then Mr. Knowlson cannot deny the agency, and is bound by the acts of Mr. Horner. In other words, the relation of principal and agent does not entirely depend upon the express appointment; but it may be implied from the works and conduct of the parties under the circumstances in the case. You will therefore take into consideration all the facts and circumstances in this case, and if you find that from the express authority conferred upon Mr. Horner by Mr. Knowlson an implied authority to purchase the goods in question could reasonably be inferred, then your verdict should be for the plaintiff. It is an established rule that, when a principal by any such acts or conduct has knowingly caused or permitted another to appear to be his agent, either generally or for a particular purpose, he will be estopped to deny such agency to the injury of third persons who have in good faith and in the exercise of reasonable prudence dealt with the agent on the faith of such appearance. This rule is particularly true if the principal has by act and conduct recognized such agency through a long course of dealings, or through many transactions. It is also stated in the decision of our Supreme Court, 142 Mich. 9 [105 N. W. 1], that it is equally well settled that having dealing, the general character or scope of the agency, the party is authorized to rely upon the agent having such powers as naturally and properly belong to such character, and in the absence of circumstances putting him upon inquiry he is not bound to inquire for secret qualifications or limitations of the apparent powers of the agent. It is the law that, even where there is no agency, either expressed or implied of an agency by reason of apparent authority, holding out, or estoppel, still the principal may be bound by the acts of his agent by virtue of subsequent ratification of the agent's unauthorized acts. The authority of the agent on this branch of the matter is not dependent upon any authority, express or implied, conferred by the principal, but depends

Digitized by Google

upon the knowledge and acts of the principal subsequent to the acts of the agent."

While the range which the testimony was permitted to take and the contentions of counsel may have been in part responsible for the form of the charge, I am impressed that, as is claimed by appellant, it was confusing and probably misleading. Reading it leaves one in doubt about the rule given for determining whether defendant was to be held bound by his agent's act.

There is no testimony tending to prove that plaintiff or its agent and salesman had any knowledge or information concerning the apparent authority of defendant's agent Horner before making the bargain, beyond the immediate action and statements of Horner himself at the time the sale is claimed to have been made. In his deposition the salesman says he called at defendant's place of business and met and talked with Mr. Horner, "who is buyer for Mr. Knowlson, relative to the purchase of paint from my employers." It does not appear that he knew that Knowlson was absent, that he had ever done any business with Horner before, that he knew that Horner ever purchased goods for defendant, or that he made any inquiry concerning the authority he possessed. He did not ascertain or inquire about the general character or scope of Horner's agency. He acted, apparently, wholly upon the assumption that, because he was willing to do business with him, he had authority to do it. This being so, plaintiff was in no position to rely upon any holding out of Horner by defendant as his agent for the purpose of buying goods, since one is not affected by facts of which he has no knowledge. It was, of course, proper for plaintiff to prove the scope of Horner's agency, and, if he could do so, to show that it extended so far as to authorize him to purchase, as

Digitized by Google

in this case, a line of goods not before carried by defendant.

It is undisputed that Horner was not left in full charge of the business; the bookkeeping and financial part of it being in charge of another. But to leave it to a jury to speculate upon the question of whether the particular goods "would be handled in that kind of a concern, whether it was a kindred business, such a business as Mr. Knowlson himself would expect an agent to take on, and there would be an implied understanding between them, if not an express understanding, that in anything like this he would have authority to use his best judgment in indorsing it and taking it on," is rather dangerous, in the face of undisputed testimony stating the limits of the agent's actual authority.

Again, upon the subject of ratification by defendant of what Horner had done, the court said:

"While it is true that in the present case Mr. Knowlson claims that he had no knowledge of the correspondence had between the plaintiff and himself until a week or two after October 1, 1911, yet it is the law that notice to the agent is notice to the principal, and inasmuch as it appears from the undisputed evidence in the case that Mr. Horner was carrying on the correspondence in question under the express authority and direction of Mr. Knowlson, Mr. Knowlson would be chargeable with notice of all the facts and circumstances contained in the correspondence.

"In other words, it is the law that, where such constructive notice exists, the party who receives such notice is held to have ratified the acts of the assumed agent. I will repeat that. In other words, it is the law that such notice constitutes constructive notice to him, and where such constructive notice exists the party who receives such notice is held to have ratified the acts of an assumed agent. You are instructed that a principal who, with full knowledge of all the material facts affecting his rights, received the benefit of an unauthorized agreement made by one purporting

Digitized by Google

to be his agent, is precluded thereby from questioning the agent's authority in the transaction."

If the jury believed defendant, who testified as a witness, they would have found that he (defendant) was informed by his agent (Horner) that the goods had been sold to him conditionally, the conditions being stated, and did not know that Horner had assumed to buy them, or to give, in his name, or otherwise, an unconditional order for them. It appears that Horner was claiming in the correspondence with plaintiff upon the subject that such was the arrangement. Assuming that defendant was chargeable with notice of plaintiff's claim in that behalf, as shown by the correspondence, and with notice that his agent (Horner) was disputing the claim, he might be excused for assuming that the dispute would be settled agreeably with his agent's contention. He might be excused from immediately saying, in effect:

"If you claim it was a sale, my agent had no authority to purchase."

Believing this testimony, they could not have properly found that he ratified an unconditional purchase of the goods. He might have been willing to ratify a conditional purchase, made by Horner in excess of his authority, and unwilling to ratify an unconditional purchase. In any view of the matter, it is not apparent in what manner the charge last above referred to could have aided the jury. If by it was meant that a principal is chargeable with constructive notice of the unauthorized acts of his agent, it was erroneous. If that was the law, it would be impossible for a principal to escape responsibility for any unauthorized act of his agent.

The question of fraud was properly withdrawn from the jury. Defendant's agent did, or did not, with authority, purchase the goods unconditionally. If he had authority, express or implied, that is sufficient, and

Digitized by Google

the case is as if defendant had himself given the order. If he had no authority to make the purchase, defendant, with knowledge of the actual transaction, did, or did not, ratify the transaction.

These were the issues properly raised by the testimony and they were not, in my judgment, submitted to the jury with proper instructions. It does not seem likely that the questions raised upon rulings admitting and rejecting testimony will be troublesome upon a new trial of the actual issues. It is clear, however, that such sales of the goods as were made according to the theory and belief that they were consigned for sale, and such, if any, as were made by agreement of counsel, do not tend to prove ratification by defendant of an unconditional purchase by defendant's agent.

The judgment we feel compelled to reverse, and order a new trial.

BROOKE, C. J., and KUHN, STONE, BIRD, MOORE, and STEERE, JJ., concurred.

The late Justice MCALVAY took no part in this decision.

BOTTOMLEY *v.* BROWN.

1. CONTRACTS—CONSTRUCTION—ELEVATORS—AGREEMENT NOT TO RE-ENGAGE IN BUSINESS.

   Where defendant sold his elevator and warehouse and agreed not to "build any elevator nor directly or indirectly engage in the elevator or grain business, except for the purpose of buying grain to be ground at his mill," his subsequent

Digitized by Google

action in installing machinery in his mill for the purpose of cleaning and handling beans, and engaging in the business of buying beans, was in violation of his contract not to engage in the elevator business, although previous to the sale he had not engaged in buying and selling beans.

2. SAME—RESTRAINT OF TRADE—PUBLIC POLICY—FRAUD.

In the absence of fraud, such agreement to refrain from re-engaging in the elevator business in a little community where one elevator was useful and two could not probably survive, although the contract did not refer to the sale of the good will of the business, is not void as against public interest.

3. NAMES — FICTITIOUS NAMES — STATUTES — COMPLIANCE WITH STATUTE—CONTRACTS.

Act No. 164, Pub. Acts 1913, cannot be so construed as to impair the right of a promisee in respect to a promise made before its passage, and although complainants had not complied with its provisions requiring such copartnerships to file a verified certificate with the county clerk, they were not barred from enforcing a contract made before the enactment of the statute.

Appeal from St. Clair; Tucker, J. Submitted June 8, 1915. (Docket No. 4.) Decided September 28, 1915.

Bill by William C. Bottomley and Henry E. Dryer, copartners as Bottomley & Dryer, against Allen Brown for an injunction restraining defendant from engaging in the grain and elevator business at Berville, Michigan. From a decree for defendant, complainants appeal. Reversed.

Burt D. Cady, for complainants.

Moore & Wilson, for defendant.

In the year 1905 defendant sold and transferred to complainants, who are personally named in the instrument evidencing the sale and are described therein as a partnership under the name Bottomley & Dryer, an elevator and warehouse, built on railroad land at Berville, Mich., and all machinery, engines, scales, and

Digitized by Google

apparatus of every kind connected or used in the operation of said elevator. The instrument contained also the following promissory agreement:

"The said Allen Brown agrees that he will not build any elevator nor directly or indirectly engage in the elevator or grain business at or near Berville, Michigan, except for purpose of buying grain to be ground at his mill."

The purchase price was $2,500. Complainants, the vendees, took possession of the property, and have been since engaged in the elevator and grain business. In 1905 few beans were grown in the immediate vicinity of Berville, and defendant, the vendor, had not engaged in buying and selling beans. He had, however, operated the elevator, and had also a flour mill at Berville. Later more beans were grown in the vicinity, and the bean business is now the most considerable part of that carried on at the elevator. Complainants installed machinery for cleaning and handling beans in 1906 or 1907. In 1914 defendant ceased to operate his plant as a flour mill, and himself installed in it machinery for cleaning and handling beans, and engaged in the business of buying beans from the farmers. There are and have been no other elevators at Berville, which is a small community, and it does not appear that any other persons are there engaged in the elevator or grain business.

In this action complainants, relying upon defendant's promise, seek to restrain him from continuing to buy and handle beans at Berville. The trial court was of opinion that neither the promisor nor promisees had in mind, when the contract was made, the buying and selling of beans as a part of defendant's business, and that, construing the contract in the light of their actual understanding—not stretching it to cover anything not plainly and clearly within its intent and meaning at the time of its execution—defendant had not violated his agreement.

Digitized by Google

Defendant presents some further contentions, one of which is that complainants had not complied with Act No. 164, Pub. Acts 1913, when the suit was begun, and therefore cannot maintain the action. Another contention is that the defendant's promise is of no legal effect, because it is the settled policy in this State to refuse to give such promises effect unless necessary to give effect to the transfer of the good will of a business which is sold, citing *Hubbard* v. *Miller*, 27 Mich. 15 (15 Am. Rep. 153). Still a further contention is that beans are not grain, and one buying and selling them is not in the grain business.

OSTRANDER, J. (*after stating the facts*). The trial judge was wrong, in my opinion, in giving too narrow a meaning to defendant's promise. Clearly, defendant is in the elevator business, whether strictly in the grain business or not. The testimony supports the conclusion that he has introduced into his mill, as apparatus for conducting his business, machinery for cleaning and elevating beans, machinery similar in purpose and operation to that installed by complainants in their elevator. It is the most common of common knowledge that elevators built along railroad tracks as convenient facilities for receiving, storing and shipping produce handle such products as the immediately surrounding country produces. They are constructed and maintained for the purpose of handling products, the surplus of which must be finally disposed of in some other market. An elevator in a community where little except wheat is grown handles, principally, wheat. If, suddenly, all neighborhood farmers ceased to grow wheat and planted only corn, or rye, or beans, still the elevator would be the convenient facility for receiving, storing and shipping the surplus crop. It is an elevator, and the business connected with it is the elevator business. The installation of new apparatus might be necessary, but the elevator business, as it is generally

Digitized by Google

conducted, could not be carried on except by taking whatever surplus crop the community desired to dispose of. Defendant promised that he would not build an elevator nor directly or indirectly engage in the elevator business. The testimony is conclusive that he has directly engaged in the elevator business; has opened in the community an elevator where none before existed.

Is defendant's promise one which he may be compelled to observe? The headnote to *Hubbard* v. *Miller*, *supra*, which fairly states the meat of the opinion upon the point, is as follows:

"Contracts in restraint of trade, which, considered with reference to the situation, business and object of the parties, and in the light of all the surrounding circumstances, appear to have been made for a just and honest purpose and for the protection of legitimate interests, and are reasonable as between the parties, and not specially injurious to the public, will be upheld; and the weight or effect to be given to the surrounding circumstances is not affected by any presumption for or against the validity of the restriction."

In the case at bar the written instrument in question does not in terms refer to the sale of a business or of the good will of a business. In the light of surrounding circumstances, as shown by the record, it is apparent that one elevator in the little community was useful, and that two could not, probably, survive. Defendant had conducted the business in the elevator he sold with the apparatus he sold. Necessarily, the new owners bought the business, and, to leave the matter in no doubt, they eliminated the former owner by the promise which they now rely upon. There was no fraud—nothing unreasonable in the transaction. There was only the recognition by both parties of controlling circumstances. It does not appear that the public was injuriously affected by the transaction.

May complainants enforce the promise? It was

Digitized by Google

made long before the legislature required that such copartnerships as theirs should make and file a certain written and verified certificate with the county clerk. It happens that complainants do business in both Macomb and St. Clair counties. Before this suit was begun they made or caused to be made the certificate required by the act of 1913 (Act No. 164, Pub. Acts 1913), which has been referred to. For some reason, not perhaps fully explained, it seems that a certificate was not actually filed in St. Clair county until after this suit was begun. It is to be inferred that the one intended for filing lacked verification, and was returned by the clerk, was corrected, and filed after suit was begun. It was correct in form, and contained all the information which it was designed to afford.

It appears, then, that the agreement of the parties was not made while any disability of complainants existed; that the contract was, and is, a lawful one; and that the precise question which appellee's contention presents is whether, until they have complied with the statute, complainants must be denied the right to enforce the contract in the courts.

In *Cashin* v. *Pliter*, 168 Mich. 386 (134 N. W. 482, Am. & Eng. Ann. Cas. 1913C, 697), and in *Pontiac Savings Bank* v. *Pipe Co.*, 178 Mich. 261 (144 N. W. 486), it is pointed out that the disability imposed by the statute is of the offending partners, who are not permitted to enforce a contract made while the disability continues. In a sense, the complainants, in seeking to enforce the contract in question, are carrying on their business as copartners. Their business is affected by the violation of the contract, and its enforcement will benefit their business. In the same way they would be benefited if they were to bring suit upon a promissory note, in which the partnership was named as payee, the note having been made years before the statute was enacted, but falling due after it

Digitized by Google

became law. The statute was plainly not aimed at such affairs. Although it is a police measure, it should not be so construed as to impair the right of a promisee in respect to a promise made before the statute was passed. It is contracts made in the course of carrying on a business unlawfully which are affected, as to their enforcement, by the disability of the offending parties, while the disability continues.

The decree of the court below will be set aside, and one will be entered here granting the relief prayed for, including a permanent injunction, with costs of both courts to complainants.

BROOKE, C. J., and KUHN, STONE, BIRD, MOORE, and STEERE, JJ., concurred.

The late Justice MCALVAY took no part in this decision.

LA TOUR *v.* HIBBLER.

1. CONTRACTS — BUILDING CONTRACT — DEFAULT — INJUNCTION — ISSUES.

   A contractor, who is wrongfully excluded from the building by the owner, is entitled to recover any sum due him under the contract, if the issue is properly presented, in injunction proceedings by the owner to restrain him from interfering with her possession.

2. SAME — ASSIGNMENTS — CONDITIONAL JUDGMENT — PRACTICE — JUDGMENT.

   But where the contractor failed to answer complainant's bill, and was defaulted, and defendant intervened as as-

Digitized by Google

signee of only a portion of the contractor's rights, and was awarded a decree under his cross-bill, the decree will be affirmed only on condition that complainant is released from all claims under the contract.

Appeal from Wayne; Mandell, J. Submitted June 14, 1915. (Docket No. 33.) Decided September 28, 1915.

Bill by Elizabeth La Tour against William H. Hibbler and another. William R. Greig intervened as assignee of defendants. Complainant died and suit was revived in the name of Lenore La Tour as administratrix. From a decree for defendant intervener, complainant appeals. Affirmed conditionally.

Goodenough & Long, for complainant.

L. C. Stanley (*Jerome Probst,* of counsel), for intervener Greig.

In the original bill complainant charged that she entered into a contract with William H. Hibbler, who agreed to furnish all of the materials and perform all of the labor for the construction of a double-veneer store and flats upon her premises and complete the same by August 15, 1910. If said Hibbler should at any time refuse or neglect to supply enough workmen and materials, or fail to prosecute the work promptly and diligently, or fail in performing any of the agreements, the owner (complainant) might, after three days' written notice to said Hibbler, provide such labor or materials and deduct the cost from any money due or to become due under the contract, and should be at liberty to terminate the employment of said contractor, enter upon the premises, take possession thereof for the purpose of completing the work, employ workmen, and furnish required materials. In such case said Hibbler was not entitled to receive further

Digitized by Google

payment until the work was finished, and then only so much as remained of the contract price after deducting the expense of completing the work. If such expense exceeded the unpaid portion of the contract price, then the contractor should pay the difference to the owner. Hibbler defaulted, was notified, and at the expiration of the period of notice, he still being in default, the complainant terminated the employment, took possession, and provided materials and workmen to finish the work, pursuant to the contract. Said Hibbler and Nicholas De Winter, a subcontractor under Hibbler, have combined and confederated to prevent complainant from finishing the work, have come upon the premises and ordered men employed by complainant to leave, locked doors and removed the keys, caused trouble and annoyance. She has ordered them to leave the premises and desist from intimidating her workmen, but they refuse, and threaten to continue their unlawful conduct. Complainant is erecting the store and building largely for the purpose of furnishing a store for her daughter in which to carry on the millinery business. She is prevented by its being incomplete, and she is fearful that said Hibbler and De Winter, who are insolvent, will prevent its completion and do injury to the premises unless restrained. A temporary and permanent injunction are prayed for. It is a sworn bill, filed September 27, 1910. A temporary injunction was granted and issued. Hibbler entered his appearance, but did not answer, and as to him the bill is taken as confessed. William R. Greig petitions the court for leave to intervene in the cause as a defendant, setting up that on or about August 30, 1910, he purchased from De Winter "all and singular the money due and to grow due upon the construction contract mentioned in said bill [being the contract of complainant and Hibbler] and to balance due to said De Winter on said La Tour job or construction, after

Digitized by Google

the payment of labor and materials entering into said defendant De Winter's work." He gave notice of the said assignment to complainant on or about August 30, 1910. He has by virtue of said assignment "a valid and subsisting claim and interest in and to the moneys due upon said construction contract either to said De Winter directly or to said Hibbler for his benefit." He has also by said assignment acquired the right of De Winter to receive pay for certain extras due to said De Winter. This petition was filed November 4, 1910. The order asked for was granted November 5, 1910. De Winter answered the bill November 22, 1910, and in his answer says he has assigned to Greig "all the balance whatever due or to grow due to this defendant on his said subcontract with the said Hibbler." He traverses material charges in the bill, saying that complainant was not justified in terminating the employment of Hibbler and in entering upon the premises. Denies confederating with Hibbler. Claiming the benefit of a cross-bill, he says that when the writ of injunction issued he had upon the premises certain property, which he describes and values at about $117. He asks for a decree for its value. For breach of the contract by complainant he asks a decree for damages, to be ascertained.

Answering the cross-bill, complainant says she, upon learning that defendant De Winter claimed to have left chattels and effects upon the premises, repeatedly requested him to get them and take them away, denies any breach of contract upon her part, and denies that she owes De Winter anything or ever had contractual relations with him. This answer was filed November 25, 1910. Greig filed an answer and cross-bill on May 23, 1911. He reaffirms the answer and cross-bill of De Winter, and alleges that when restrained by the order of the court De Winter had performed work and labor and furnished materials in and about the erection of

Digitized by Google

the said building of the reasonable value of $757.39, no part of which had ever been paid to him, under a contract made by him with said Hibbler, had performed certain extra work and labor, and furnished material at the express request of complainant of the value of $115. Said claims had been assigned to him by De Winter. Defendant had caused to be duly filed his lien as such assignee against the premises, claiming $882.39. In his cross-bill he states that from the facts "hereinbefore stated, and now reaffirmed, in this cross-bill," he is entitled to recover from complainant $757.39 and $125 for extras, and asks for a decree for these sums. He also prays that the court will allow him a lien upon the premises, sustaining this suit as a proceeding in chancery to enforce his lien under the statute. To this cross-bill complainant demurred, and an amended answer and cross-bill was filed by Greig. This on June 22, 1911. Demurrer appears to have been overruled, and the complainant answered the said cross-bill; her answer being verified and filed October 9, 1911. Later defendant Greig petitioned for leave to file a supplemental cross-bill, and this was granted with an order that the order *pro confesso* taken against said Hibbler be amended so as to exclude from its operation and effect the rights mentioned in an assignment executed by Hibbler to Greig, dated November 14, 1911. In the supplemental cross-bill Greig sets up that since the commencement of the suit said Hibbler has assigned to him "all claim and right of action against said complainant" based on the labor and material performed in connection with the masonry contract pertaining to the land and building mentioned in the original bill. As to his asserted mechanic's lien he states that the statement was filed in the office of the register of deeds November 8, 1910, and a copy served on the daughter and agent of the complainant, then and there living on the premises, November 18, 1910, and

Digitized by Google

proof filed. He prays for a decree that complainant pay him the sum due De Winter as asserted for a lien upon the premises "under the statutes of the State of Michigan in that behalf." To this supplemental cross-bill a demurrer was interposed by complainant. Later, the supplemental cross-bill was answered by complainant. The complainant died January 20, 1913, and Lenore La Tour, her daughter and administratrix with the will annexed, was substituted as complainant. At the October, 1913, term of the court the cause came on for hearing in open court, and a decree was entered awarding the intervener $487.50. The issues (1) the right of complainant to an injunction and (2) the validity of intervener's lien, were determined against the intervener. The third issue, namely, the right of intervener to have a personal decree against complainant on account of the claim assigned to him by Hibbler, was determined as is above stated. The temporary injunction was continued and was made permanent by the final decree. The cross-bill of Greig, as assignee of De Winter, praying for a foreclosure of his alleged lien, was dismissed, the lien held to be invalid, and discharged. Complainant has appealed, and in this court contends that Greig should not have been permitted to intervene; that the supplemental cross-bill was not germane to the bill of complaint and should have been dismissed; that the assignment from Hibbler to Greig purports to assign only the amount to come due for the masonry portion of the contract, an amount not susceptible of determination, hence no recovery can be had upon it. It is contended, too, that in fact the complainant's loss through faulty workmanship and materials more than offsets the balance claimed by intervener.

OSTRANDER, J. (*after stating the facts*). If Hibbler had answered the original bill so as to present the

Digitized by Google

issues, *first*, that complainant had wrongfully interfered with his performance of the contract, and her conduct was responsible for his apparent default, *second*, that he had filed a mechanic's lien, and that it ought to be enforced in this proceeding, and, *third*, that the job was nearly completed when he was excluded and when completed by complainant it would appear that there was a balance due to him, and the court had decided these issues, excepting only the last, adversely to him, and the last in his favor, there could be, I think, no question about the propriety of awarding him a judgment for any sum found due to him. Hibbler did not answer, and Greig, his assignee, was admitted to answer for him. If his answer had presented the issues above indicated, then, even assuming there is grave question about his right to intervene, the decree would not be reversed. All interested parties would be concluded. As mere matter of administration of the law, the decree in this court would be affirmed, unless, as is claimed, it is too large. The trouble is that Greig represents the right of Hibbler with respect only to the masonry contract—the De Winter subcontract. He has from Hibbler an assignment only of his claim, demand, and right of action "so far as pertains to labor and material to be supplied by me for the masonry portion of my contract," and the extras. There was no masonry portion of his contract. His contract is single. The structure is to be erected for a certain sum of money.

Counsel for appellee say:

"Hibbler and De Winter were parties defendant to complainant's bill of complaint, and both testified in the case on behalf of cross-complainant. Neither of these persons is making any claim to any part of this money or against complainant for any money whatever. They both concede that the money has been assigned to Greig and should be paid to him, as decreed by the court."

Digitized by Google

The place where this concession may be found is not indicated, and I have not found it. What appears is that upon complainant's showing there remained unexpended of the contract price, when the building was completed, the sum of $609.76. Greig's demand exceeded this sum. The court rendered a decree in his favor for $487.50. Why for this sum does not appear. Complainant claims that the work of Hibbler was inferior, and not according to the contract. Testimony introduced by her is to the effect that to make the building conform to specifications will cost more than $1,200. What the court found with regard to the claim for extras does not appear.

The reasons which would support affirmance of the decree, if it appeared that Hibbler's entire demand was involved, are reasons for reversing it and dismissing the cross-bill of Greig if it is not involved and settled, and all parties in interest concluded, by the decree. The record does not furnish to complainant a sufficient release of Hibbler's possible demands, nor afford her security from possible further litigation.

If Hibbler is of the disposition indicated in the brief for appellee, and will either give satisfactory assurances to appellant, or will, giving notice, make and file with the clerk of this court a release and satisfaction of all demands and claims whatever growing out of the contract and its performance, the decree may be affirmed. In such event the appellant will recover from Greig, appellee, the costs of this appeal. If no release is given within 20 days after the entry of decree in this court, the decree below will be reversed, and the cross-bill of Greig dismissed, with costs of both courts to appellant.

BROOKE, C. J., and KUHN, STONE, BIRD, MOORE, and STEERE, JJ., concurred.

The late Justice MCALVAY took no part in this decision.

Digitized by Google

KIMMERLE *v.* BONINE.

TRIAL — VARIANCE — PLEADING — OPENING STATEMENT — DIRECTED VERDICT.

Although plaintiff's counsel, in his opening statement, used language that was ambiguous and somewhat at variance with the declaration, it was erroneous for the trial court to direct a verdict for defendant, where part of the opening statement was conformable to the declaration, and there was testimony tending to support it.[1]

Error to Cass; Des Voignes, J. Submitted June 21, 1915. (Docket No. 77.) Decided September 28, 1915.

Assumpsit by Grover Kimmerle and another, copartners, doing business as Kimmerle & Sears, against J. Gordon Bonine for goods sold and delivered. Judgment for defendant upon a directed verdict. Plaintiff brings error. Reversed.

Clyde W. Ketcham (*W. J. Barnard,* of counsel), for appellants.

C. M. Lyle and *M. L. Howell,* for appellee.

OSTRANDER, J. Plaintiffs declared for the price and value of a Ford touring car and a Ford roadster, the coverings, platings, extras, and accessories, sold and delivered to defendant. Their bill of particulars calls for the sum of $1,202. Defendant pleaded the general issue, with notice that he would prove that the automobiles and equipment mentioned in the bill of particulars were exchanged by plaintiffs with defendant for two automobiles owned by defendant and by him delivered to plaintiffs and $140, difference in value,

[1] As to right to direct verdict or enter nonsuit on opening statement of counsel, see note in 29 L. R. A. (N. S.) 218.

Digitized by Google

which he duly paid to plaintiffs, $100 in cash, and a check for $40; that he also duly tendered them the sum of $40. The cause coming on to be tried by the court and a jury, plaintiff's attorney made to the jury a statement of the facts he expected to prove, and called defendant as the first witness. The witness testified, among other things, that according to the agreement of the parties he traded plaintiffs a Stanley steamer car and an old Ford runabout, and paid $140 for the property mentioned in the bill of particulars. Both of the plaintiffs and the wife of plaintiff Kimmerle were then called as witnesses, and they gave testimony tending to prove the allegations of the declaration and that defendant purchased the goods mentioned in the bill of particulars, agreed to pay for them, and did pay on account the sum of $100; that he owed the remainder of the purchase price; that there was no exchange of property, but that they (the plaintiffs) were to help defendant sell his second-hand cars. Defendant offered no testimony. The court directed a verdict for defendant, saying:

"The court bases one of the reasons for a directed verdict, which I shall call upon you to make, that this contract as it now stands is executory in its character as testified to, or as claimed, rather by the counsel in his opening statement, to wit, that is, that Grover and Mr. Sears were to take these two cars for the doctor and sell them as best they could, and apply whatever they were able to get out of them on the purchase price of the new cars, and then the doctor was to pay the balance; in other words, the status of the case was not such that suit could be predicated at this time. These two cars had not been sold. There was no way of determining; in fact, those proceedings could not be brought until there had been a sale made of these cars. Therefore the suit was prematurely brought. And for other reasons which appear here, and which the court had made a matter of record, you will return a verdict in this case of no cause of action."

Digitized by Google

Defendant's counsel moved for the peremptory instruction, saying:

"Now at this point, then, if your honor please, I now make two motions in the case, and I make the two together for convenience. The first is a renewal of the motion made a while ago to strike from the evidence the testimony of Grover Kimmerle to the effect, and all of the testimony of his to the effect, that the sale was an outright sale and different from the sale stated and described in the opening statement of his counsel. *Second*, that a verdict then be directed for the defendant on the ground that there is no evidence supporting the declaration."

Thereupon the following occurred:

"*The Court:* In other words, that you claim under the declaration that they declare upon an executed contract?

"*Mr. Howell:* Yes, your honor.

"*The Court:* And that the proof shows that it is executory?

"*Mr. Howell:* After the striking out of the other testimony, then, that is what remains, and nothing else, and that is the testimony, from the testimony of Mr. Sears and the testimony of Dr. Bonine.

"*The Court:* Now, gentlemen, I have listened to you patiently on some of these questions, before the noon recess and since, and as is well known to you gentlemen, an opening statement is the basis upon which the action must be predicated; and if during the course of the trial a different claim is made and a different theory produced upon the trial, and that occurs, the seat of the action must necessarily fail. That is elementary; we know that. Now, the question for our discussion is this: What was that statement, and is there a variance in that respect? Counsel for the plaintiffs in his opening statement, after making a page or two of comments in relation to them as to what they claim, said:

"'Finally, gentlemen, this arrangement was made, in effect, in substance: That Grover and Mr. Sears were to take these two cars for the doctor and sell them as best they could, and apply whatever they were able to get out of them on the purchase price of the new cars, and then the doctor was to pay the balance.'

Digitized by Google

"Now, gentlemen, that, of course, in substance, must have been the claim and the theory upon which the plaintiffs would seek to recover in this case. True, there were other things said by counsel, but they were explanatory. Why? Explanatory of this very proposition which he said was, in effect, the agreement which I have just read. Now, when the motion was made before to direct a verdict, it seemed to me that the court should not entertain the motion at the time, but listen and see what, if anything, was offered on the part of the plaintiffs further on in relation to this case. Now, the partner of Mr. Kimmerle, Mr. Sears, takes the witness stand, and this is his testimony:

"'Isn't it a fact that Grover had told you substantially what Mr. Ketcham said in his opening statement?

"'*A.* Well, I don't recollect of what Mr. Ketcham said.

"'*Q.* Why, that the cars, the old cars, were to be sold, and the amount credited on the purchase price of the new one?

"'*A.* Grover didn't tell me that at this time.

"'*Q.* When did he tell you that?

"'*A.* After the cars had been nickeled and the seat covers had been put on.'

"Now, gentlemen, there is no difference between that statement of Mr. Sears as to what Grover told him finally, as to what the arrangement was, than what was stated by the counsel in the opening statement. I am satisfied, gentlemen, that from the testimony of the plaintiff while upon the witness stand that no recovery can be had in this case in any court, especially under the pleadings in this case."

Plaintiffs were offered, but declined, the right to submit to a nonsuit. The ruling and direction of the court is assigned as error.

We were impressed at the hearing, and examination of the record and briefs has only deepened the impression, that there had been a mistrial. Why counsel for plaintiffs, in his opening, traveled as far as he did, we are not now concerned about. It is true that in the course of the opening the attorney for plaintiffs, in stating the bargain he expected to prove, used language referred to by the court—a somewhat ambiguous

Digitized by Google

statement, especially when read with the entire opening. Counsel for plaintiffs also said:

"Gentlemen of the jury, it will appear, I think, to your entire satisfaction, so that you will be moved by the force of the evidence to render a verdict for the plaintiff for the full amount which is asked, that the contract which is claimed by Dr. Bonine was never made. Not only will that appear to you, gentlemen of the jury, from the oral testimony which the plaintiff will introduce, but from the sheer weight of all human probability that it never was consummated, that the doctor had agreed, as we claim, to purchase two cars for a certain price and pay for them in money, that Mr. Kimmerle was only acting as the agent for Dr. Bonine, for his accommodation, and to make a satisfied and a happy customer for his garage, as an accommodation to the doctor, seeking to sell these cars and get out of them what he could to apply it upon the purchase price, and that this other claim of the doctor is a wicked claim, unfounded in fact and untrue, and, gentlemen of the jury, when we are through, we shall ask for a verdict for the plaintiff."

In view of the testimony the court might have as well accepted this portion of the opening as the portion made the basis of the refusal to try the issue made by the pleadings and the testimony.

But beyond this there is fundamental error in the theory relied upon to support the ruling complained about. No objection was made after the opening statement was concluded that counsel had failed to state a case within the pleadings. Such an objection might have resulted in making certain what, at the most, can be only called uncertain. The verdict was not directed upon the ground that counsel in opening had not stated a case. While there is some ambiguity in the language used by the court, it would seem that the verdict was directed upon the ground stated by counsel for defendant in his motion, namely, that such testimony as was not conformable to the opening of counsel

Digitized by Google

for plaintiffs should be stricken out, and that what was left made no case within the pleadings.

When the motion to direct a verdict was made, the question for the court to consider was whether there was any testimony which tended to support the allegations of the declaration. That there was such testimony is clear. It is quite probable that a precisely similar case has not before arisen, a case in which an alleged erroneous opening and some testimony tending to support it was contrasted with testimony supporting the declaration, and it was held, as a matter of law, that the opening and a part of the testimony required the rejection of the remainder and a nonsuit or a verdict for defendant. In *Meade* v. *Bowles*, 123 Mich. 696 (82 N. W. 658), the opening statement of counsel was that the agreement was to pay a reasonable fee for legal services. The testimony tended to prove an agreement to pay $10 a day. It was held that the proof was within the declaration and admissible.

We, of course, express no opinion concerning the merits.

The judgment is reversed, with costs to appellants, and a new trial granted, costs of the trial to abide the result.

BROOKE, C. J., and KUHN, STONE, BIRD, MOORE, and STEERE, JJ., concurred.

The late Justice MCALVAY took no part in this decision.

Digitized by Google

HYNES *v.* BARRETT.

DRAINS — LANDS BENEFITED — INJUNCTION — TAXATION—NATURAL WATER COURSE.

Where the drain traversing complainant's land requires a new outlet, which will be furnished by a proposed improvement of a natural water course in another county, complainant's contention, in injunction proceedings to restrain defendant from assessing his land for said improvement, that his land will not be benefited because it is higher than said water course and already sufficiently drained, cannot be sustained.[1]

Appeal from Gratiot; Searl, J. Submitted June 22, 1915. (Docket No. 112.) Decided September 28, 1915.

Bill by Charles F. Hynes against James Barrett and others, as drain commissioners, for an injunction to restrain defendants from assessing complainant's lands for a proposed drain improvement. From a decree for defendants, complainant appeals. Modified and affirmed.

Stone & Smith, for complainant.

J. P. Devereaux, for defendants.

OSTRANDER, J. What is set up in the bill of complaint is restated as follows: Complainant owns land in section 16 in the township of Wheeler, Gratiot county, Mich., worth several thousands of dollars, in which land is a drain, laid more than 20 years ago, known as Weeks drain—a drain constructed in Saginaw and Gratiot counties by the joint action of the then drain commissioners. The outlet was near the southwest corner of section 5, Richland township, Sagi-

[1] As to basis of liability for assessment for drains, see note in 58 L. R. A. 353.

Digitized by Google

naw county, in a natural water course, which conducted the water in an easterly direction into Swan creek. About two years after the said drain was constructed, a petition was presented to the drain commissioner of the county of Saginaw, praying for an extension of said drain to Swan creek. Whereupon the drain commissioner for Saginaw county notified the drain commissioners of Gratiot and of Midland counties to meet with him to take joint proceedings in the premises. It was determined at the meeting which was held that the drain commissioner of Gratiot county was not a necessary or proper party to the proceeding, and the drain commissioners of Midland and Saginaw took some proceedings, the exact nature and extent of them being unknown to complainant; action resulting in constructing Weeks extension drain from the point on section 5, Richland township, towards Swan creek, to section 34, Midland county. In the year 1911 joint proceedings were taken by the drain commissioners of Saginaw, Midland, and Gratiot counties to clean out, widen, and deepen Weeks drain and Weeks extension drain, and to extend the drain from its terminal on section 34 aforesaid to Swan creek. A final order of determination was made, and an assessment of benefits, and a day appointed for letting contracts for the work. In the said assessment complainant's north 40 acres was included, the assessment being .35 of 1 per cent. and the south 40 acres, with an assessment of .3 of 1 per cent, of the entire cost of constructing said improvement. Before contracts were let or the assessments reviewed, and in May, 1912, the circuit court in chancery, for Saginaw county, enjoined the making of the improvement, and the defendants in said suit, said drain commissioners, were enjoined from making the said improvement until Swan creek was deepened, widened and cleaned out, from its mouth in Shiawassee river to the north line

Digitized by Google

of section 16, Thomas township, Saginaw county; the decree providing that defendants might, however, proceed to improve Weeks drain, but not so as to discharge any additional water into Swan creek, until said creek had been first widened, deepened, and cleaned out. From the decree no appeal was taken.

Swan creek is a natural water course, a part of it in Midland county, and it flows east and easterly, southeasterly and southeast, to Shiawassee river, in Saginaw county; its course in that county being 15 miles long. No part of it is in Gratiot county; it being at its nearest point 11 miles from the meridian line which bounds Gratiot county on the east and Saginaw county on the west.

In July, 1911, a petition was presented to the drain commissioner of Saginaw county to clean out, widen, and deepen Swan creek from its outlet to a point in section 16 in the township of Thomas in said county. Before the entry of the final decree above referred to, proceedings had been taken under said petition ordering a survey of the proposed improvement. After the entry of said decree, the drain commissioners of Saginaw, Midland, and Gratiot counties took some further joint proceedings to improve Swan creek, making a final order of determination, which required the dredging of Swan creek for a distance of nearly 12 miles, the cut to be 40 feet wide; the depth varying from 3.1 feet to 19.7 feet, with an average of about 9 feet. With the erection of bridges, which will be necessary, the said improvement will cost $75,000. The drain commissioners were unable to agree upon the percentage of said cost which should be borne by each of the three counties, and called in the State highway commissioner, who decided that Saginaw county should bear 70 per cent., Midland county 23 per cent., and Gratiot county 7 per cent. They are (August 19, 1914) about to go on and make a final order of deter-

Digitized by Google

mination, let contracts, and assess 7 per cent. of the cost of said Swan creek improvement upon lands in Gratiot county, and the drain commissioner of Gratiot county has said that, if he is required to assess 7 per cent. of the cost upon lands in Gratiot county, he will lay it upon the lands assessed for improving the Weeks drain, upon the same basis as to benefits as was used in that proceeding. There are no other drains in Gratiot county which discharge any water into Swan creek, and no watershed other than that drained by the Weeks drain which discharges water into Swan creek. The original assessment for constructing Weeks drain was laid upon the basis of 40 per cent. upon lands benefited lying in Gratiot county and the remainder upon lands in Saginaw county, and complainant's said lands were assessed one-tenth of the entire cost. In the proceeding which was enjoined, 35 per cent. of the cost was apportioned to be paid by Gratiot county. It is believed that 24 per cent. of Weeks drain is in Gratiot county, the remainder being in Saginaw county. The threatened assessment for the Swan creek improvement, if laid, will tax the lands of complainant $100. Complainant concludes that all the proceedings taken by the three drain commissioners and the State highway commissioner to improve Swan creek are illegal and void as to complainant, and as to any lands lying within the county of Gratiot. An injunction is prayed, restraining action which will subject Gratiot county lands, including those owned by complainant, to any part of the cost of improving Swan creek.

To the bill the drain commissioner of Saginaw county, one of the defendants, demurred. He says the legality of the steps taken to establish the Swan creek drain can be raised only by certiorari; that the determination of what lands shall be included in the special assessment district to bear the cost of con-

Digitized by Google

structing said drain is committed by statute to certain officers, whose decision is final, and the chancery court has no jurisdiction; that it is not charged in the bill that complainant has been notified that his land is to be included in the said special assessment district, nor that there is any trespass or threatened trespass upon his property; that the question whether complainant has the right to use Swan creek in its natural state, regardless of the effect upon the lower proprietor, is *res adjudicata,* as is also the question of the legality of the proceeding to establish Swan creek drain; no case for equitable interference is stated in the bill.

The cause coming on to be heard on bill and demurrer, the demurrer was sustained and bill dismissed. Complainant, appellant, states the question involved in this way:

"Have the drain commissioners of two or more counties jurisdiction or authority under our statute, in the improvement of a natural water course, increasing its capacity, to assess lands therefor in counties not traversed by such water course, and which lands are on such elevation above the point in the water course where the improvement is made that it is a physical impossibility for such lands to be benefited or affected in any manner by the improvement, and the only reason for the assessment being that the surface water from such lands flows in the direction of the water course, and naturally finds its way over the surface to the natural water course which constitutes their natural outlet to the Great Lakes?"

I quote further from the brief:

"This question has never been before this court, and is of great importance, and the decision of this court is likely to be of far-reaching consequences to the whole State. As the country becomes improved by the removal of timber and the putting in of large drainage systems, both surface and under drains, the water finds its way into the streams so quickly that floods, more or less disastrous, are of annual occurence. Each year it becomes more apparent that the only way to

Digitized by Google

obviate or relieve this difficulty is to increase the capacity of these streams which are the outlets for the water. It is our contention that our statute does not confer jurisdiction to do what is attempted in the instant case. No question is made in regard to the regularity or sufficiency of the petition or of the subsequent proceedings, if they had been taken in a case coming within the statute; but we contend there is an entire lack of jurisdiction to make the assessment upon lands in Gratiot county. We also call attention to the fact that we are not attempting to enjoin the proceedings to make the improvement in question, but only attempting to prevent the reporting of an assessment upon lands in Gratiot county therefor."

It is charged in the bill that, as shown by the surveys and levels made in said proceedings, there is a natural fall from the meridian line to the southwest corner of section 5, in Richland township, of more than 42 feet, a natural fall from the point near the southwest corner of said section 5 to the south quarter post of section 34, in the township of Ingersoll, of more than 15 feet, and from the last-mentioned point to the surveyed point in Swan creek a natural fall of more than 13 feet, and a considerable fall from the last-mentioned point to the north section line in said Thomas township. Stated in a few words, what is set up in the bill, with the necessary inferences, amounts to this: Complainant owns land which is traversed by Weeks drain. An outlet is desired for Weeks drain into Swan creek, a natural water course. Such an outlet has been refused by a court until the capacity of Swan creek is increased. A proceeding is pending, the purpose of which is to increase the capacity of Swan creek. The cost of the necessary work is to be borne by three counties, and some of it will be levied upon complainant's land. Complainant's land cannot be benefited by the work on Swan creek, because it and the surrounding land have an altitude much higher than that of the land in which the creek runs, an alti-

Digitized by Google

tude which secures, naturally, drainage of the said land, which natural drainage is matter of right. The question whether, if benefited by the improvement of Swan creek, the fact that it is in Saginaw county, and complainant's land in Gratiot county, would preclude the levying of a tax for benefits, is not debated.

The bill cannot be read in such a way as to sustain complainant's theory. It must be assumed that his lands are benefited by the Weeks drain; that the Weeks drain needs a new outlet; that the new outlet should be in Swan creek. It may be assumed that, if the outlet is established, Swan creek, in its present state, although a water course, cannot receive the water. Therefore it must be enlarged. In this way a connection is established between a benefit to complainant's land and the enlargement of Swan creek. It may be admitted that lands which are not benefited by a public improvement, like a drain, cannot be specially taxed to pay for the improvement. We need not consider whether, if it was admitted that complainant's land was not benefited by the improvement of Swan creek, the bill would lie. There is no such admission. It may occur that, having exhausted all statute remedies to which he may be entitled, complainant may later require the assistance of a court of equity.

We therefore modify the decree, so as to dismiss the bill without prejudice to any further proceeding complainant may be advised to take. The appellees will recover costs of this appeal.

BROOKE, C. J., and KUHN, STONE, BIRD, MOORE, and STEERE, JJ., concurred.

The late Justice MCALVAY took no part in this decision.

Digitized by Google

GOGARN v. CONNORS.

MORTGAGES—DEEDS—CONSTRUCTION OF DEED.

The conveyance of land in consideration of a certain sum of money and an agreement by the vendee to reconvey within three years if the vendor should so elect and tender the money, must be treated as an absolute conveyance of the land with an option to repurchase, and not as a mortgage.

Appeal from Marquette; Flannigan, J. Submitted June 22, 1915. (Docket No. 91.) Decided September 28, 1915. Rehearing denied April 21, 1916.

Bill by Charles A. Gogarn and another against Thomas Connors for an accounting and to redeem from a deed absolute on its face, but alleged to have been given as security only. From a decree for defendant, complainants appeal. Affirmed.

J. L. Heffernan, for complainants.

Frank A. Bell, for defendant.

Complainant Gogarn in 1903 was in debt to defendant and wanted an advancement of money. Complainant owned 40 acres of land, described in the pleadings. Defendant furnished the money asked for, and complainant deeded him the land by warranty deed. As a part of the transaction they executed a written agreement, which recited the debt and the conveyance of the land, that the complainant desired to redeem the land, "if able, within the time limited," and provided that, in case the complainant should pay defendant $500, and all other sums of money he might be owing him, within three years, the land should be reconveyed. During the three-year period some correspondence took

Digitized by Google

place between the parties, in the course of which defendant furnished a statement of the amount of the indebtedness. In 1904 complainant Gogarn gave defendant a mortgage for $400, conveying the land. The debt was never paid. In October, 1913, complainant, having attempted to transfer to complainant Foard an interest in his rights, joined with him in filing in this cause the bill to redeem. The cause being at issue and heard in open court, the bill was dismissed.

OSTRANDER, J. (*after stating the facts*). The decree must be affirmed. The transaction—the deed and agreement—did not constitute a mortgage. Complainant had the right of election to pay or not to pay the debt, to refund or to keep the money. The remedies of the parties were not mutual or reciprocal. The transaction must be treated as an absolute conveyance of the land with an option to repurchase. *Swetland* v. *Swetland,* 3 Mich. 482; *Emerson* v. *Atwater,* 7 Mich. 12; *Cornell* v. *Hall,* 22 Mich. 377; *Stahl* v. *Dehn,* 72 Mich. 645 (40 N. W. 922); *Reed* v. *Bond,* 96 Mich. 134 (55 N. W. 619); *Blumberg* v. *Beekman,* 121 Mich. 647 (80 N. W. 710); *Sowles* v. *Wilcox,* 127 Mich. 166 (86 N. W. 689). The unmistakable intent of the parties is recited in the agreement for a reconveyance.

Defendant will recover costs.

BROOKE, C. J., and KUHN, STONE, BIRD, MOORE, and STEERE, JJ., concurred.

The late Justice MCALVAY took no part in this decision.

Digitized by Google

ROBBINS *v.* TREBILCOCK.

MASTER AND SERVANT—DEATH—NEGLIGENCE—SAFE PLACE—OBVIOUS DANGER.

In an action for the death of plaintiff's decedent, who was killed by the falling upon him of an overhanging bank while he was engaged in shoveling earth below, where defendants never assumed the duty of advising the men that it was not safe to work under an overhanging bank or that it was necessary to break down an overhang, and no assurance was given that the apparent condition of the bank was not the real condition, and the danger was too obvious to demand warning or inspection, defendants were not guilty of any negligence entitling plaintiff to recover.[1] *Livingstone* v. *Plate Glass Co.*, 146 Mich. 236.

Error to Marquette; O'Brien, J., presiding. Submitted June 24, 1915. (Docket No. 40.) Decided September 28, 1915.

Case by Winifred Robbins, administratrix of the estate of William Robbins, deceased, against William Trebilcock and another, copartners, doing business under the name of Trebilcock Brothers, for the wrongful death of plaintiff's decedent. Judgment for plaintiff. Defendants bring error. Reversed and no new trial granted.

William P. Belden and *Thomas Clancey*, for appellants.

Le Gendre & Driscoll, for appellee.

OSTRANDER, J. Defendants were constructing a concrete dam, in doing which they used earth and gravel taken from an open pit in the immediate vicinity of

[1] On responsibility of master for safe place to work where conditions are changing, see notes in 19 L. R. A. (N. S.) 340, 28 L. R. A. (N. S.) 1267.

Digitized by Google

the dam, which was loaded upon wagons and drawn by horses to the dam. They employed between 40 and 50 men, among them two teamsters and several gangs of shovelers. The pit was in level ground, was opened in a northerly and southerly direction, was entered at the south, and was about 50 feet wide and 100 feet long. The breast of the pit, against which the men were working, was on the east side, where, upon the particular occasion, and at the particular point of interest here, the wall was about 8 or 9 feet high. The soil was sod at the top, clay, sand, and gravel, the top crust frozen to a depth of 6 to 10 inches. To remove the earth the men used picks and shovels in the bank, undermining the top and permitting it to fall, did some blasting, drilling the holes for dynamite with a steel bar, by hand, and were obliged sometimes to go upon the top and break or bar down portions which did not fall. Working hours were from 7 o'clock in the morning until 5 o'clock in the evening; the time used being 45 minutes faster than standard time. Plaintiff's decedent, a sober, steady workman, 25 years old, was hired as a shoveler, and began work at 7 o'clock on the morning of December 2, 1911. He had previously worked in iron mines and in excavating earth for basements, or cellars, in Ishpeming. Working in the gang with him were three other shovelers. At some point in the east wall they began work after some discussion respecting the character of the bank, deciding to drill and blast it down. After firing the blast, they began loading the earth, and continued to do so until near quitting time at night, when a wagon was brought in for the last load. At the place they had been working the loose earth had been removed, and the teamster spotted the wagon at a point some 25 feet away, where considerable loose earth had dropped and was lying on the floor of the pit. At this point no work had been done for two days. There was an overhanging bank

Digitized by Google

there. The wagon was placed 6 or 8 feet from the bank and where it was from 8 to 9 feet high. Plaintiff's decedent was working between the rear end of the wagon and the bank, when the overhanging "chunk" of earth fell, pinning him against the wheel and fatally injuring him.

From this statement it would appear that the men, including plaintiff's decedent, were engaged in the most common labor in the face of a possible and obvious, but not probable, danger—a danger as well to be appreciated by one man as by another. But counsel for plaintiff in the brief and argument asserted two principal propositions from which the responsibility of the employers for the event is deduced. He contends: *First*, that the alleged dangerous situation was created before plaintiff's decedent's employment began; and, *second*, that the employers assumed and performed in the course of the work the duty of barring down overhanging banks. The last proposition stated involves in argument, if the duty existed, the duty to keep watch of the banks, to inspect the pit, to warn if the duty had not been performed. The duty of the employers to maintain a reasonably safe place for the men to work is, in short, the general duty asserted, and the jury was instructed that such a duty existed.

There is testimony supporting the conclusion that the employers were solicitous for the safety of the men working in the pit, cautioning them, commanding them, not to work under an overhanging bank, keeping a general oversight of the work. It does not appear that plaintiff's decedent heard any such commands or was himself warned of danger. There is the following testimony to which we are referred by the brief:

"It was the custom there for Trebilcock and Carlyon to do the inspecting. They were supposed to inspect the place before they sent men or allowed men to go in. That had been customary all the time I was there.

Digitized by Google

"*Q.* In other words, they made the men shovel dirt and keep at that and did the inspecting and watching the place?

"*A.* Yes; they had to keep their shovels going.

"*Q.* And the boss and Carlyon watched after the safety of the place?

"*A.* Of course, they had two or three places to watch besides this one. They would go around and watch the different places and keep the men working.

"*Q.* In other words, the men didn't inspect the place. Carlyon and Trebilcock inspected the place, and the men shoveled the dirt?

"*A.* Yes; that is the way it was always done."

It is the contention of defendants, appellants, *first*, that the testimony fails to establish—does not tend to establish—negligence of the defendants. There are other contentions, but the case must be disposed of upon this one. We find no testimony tending to prove failure of defendants to perform a duty owing to plaintiff's decedent; we find none supporting the proposition that defendants ever assumed, or performed, the duty of barring down the overhanging banks. On the contrary, the men uniformly did such work. Day by day the men working on the floor of this pit were digging into the bank, breaking it down, and putting the earth into wagons. If, after being undermined, the bank did not come down, it was picked or barred down. With seven or eight gangs of shovelers, four men in each, the work of breaking down the bank in some part of the pit must have been practically continuous. The testimony upon which plaintiff relied, and relies, must be read with the remainder of the testimony of the witness and other witnesses. So read, it is made entirely evident that while the employers overlooked the work, brought their experience and "safety first" ideas into operation, they never assumed, and the men never assumed, that it was a part of their duty to advise them that it was not safe to work under an overhanging bank, or that it was necessary to break

Digitized by Google

down an overhang which otherwise would not or did not fall. The work was too simple and such danger as existed was too obvious to demand warning or inspection as a duty.

The case at bar and *Livingstone* v. *Plate Glass Co.*, 146 Mich. 236 (109 N. W. 431), cannot be distinguished by the fact that plaintiff's decedent had not done work at the particular place in the pit—was not one of the men who left the particular overhanging bank in position. All the men employed there were taking down the bank. The work was in all stages, from hour to hour and day to day. As the bank was left at night, so it might or might not be found upon beginning work in the morning. As men moved from point to point along the bank, they were necessarily confronted with the results of the last operation of fellow workmen, and perhaps also the results of the operation of the law of gravity. There was, in the nature of things, and could be, no guaranty that any particular set of men had left any particular part of the bank a safe place to work under or near. Plaintiff's decedent was not, in fact, relying upon the opinion or any undertaking of his employers.

For the reason that the case is, in principle, ruled by the one last above cited, it is unlike *Livingway* v. *Railway Co.*, 145 Mich. 86 (108 N. W. 662); *Druck* v. *Lime Co.*, 167 Mich. 154 (132 N. W. 492); *Lewis* v. *Brick Co.*, 164 Mich. 489 (129 N. W. 726); *Simone* v. *Kirk*, 173 N. Y. 7 (65 N. E. 739); and similar cases. No portion of the bank of this pit was expressly or impliedly tendered to plaintiff's decedent as permanent, or as safe, no such representations were made to him, no assurance was given by custom or otherwise that the apparent condition of the bank was or was not the real condition. The open pit, away from the walls, was safe. But if the defendants had neglected a duty to bar down the particular overhang of the

Digitized by Google

bank, the fact was apparent. There was the overhang —a slight one to be sure, but visible, and as ominous to plaintiff's decedent as to any one else. However slight the peril may have seemed to be, it was not removed or avoided. The result was most unfortunate, but cannot be attributed to defendants.

The judgment is reversed, and no reason appears for granting a new trial.

BROOKE, C. J., and KUHN, STONE, BIRD, MOORE, and STEERE, JJ., concurred.

The late Justice MCALVAY took no part in this decision.

McRAE *v.* SLEEPER.

1. FRAUDULENT CONVEYANCES—INTENT—QUESTION OF FACT—EVIDENCE.

   In proceedings by complainants to set aside an attachment levy on lands sold to them by the judgment debtor, which defendants claimed was made in fraud of creditors, where the fraudulent intent is made a question of fact by the statute (3 Comp. Laws, § 9536, 4 How. Stat. [2d Ed.] § 11420), and the conclusion of the circuit judge that such sale was in fact fraudulent is supported by the evidence, his finding will be affirmed.

2. SAME—EQUITY—ACTUAL CONSIDERATION.

   Complainants' contention that they ought to be protected by the decree to the extent of the consideration actually paid cannot be sustained where the record shows that only part of the lands conveyed is subject to the levy, and the rest is ample security for the consideration actually paid.

Digitized by Google

Appeal from Montmorency; Emerick, J. Submitted June 25, 1915. (Docket No. 71.) Decided September 28, 1915.

Bill by George F. McRae and another against Albert E. Sleeper and others for the purpose of setting aside an execution levy on certain lands. From a decree for defendants, complainants appeal. Affirmed.

Joseph H. Cobb, for complainants.

Elmer G. Smith, for defendants.

Creditors of one Edward D. Pendock, defendants and cross-complainants in this action, attached certain lands. Complainants, claiming to be purchasers of some of the lands attached, filed their bill of complaint for the purpose of setting aside the attachment levy. In their answer and cross-bill defendants ask to have complainants' deed set aside as fraudulent as to creditors of Pendock. Applicable statutes are 3 Comp. Laws, §§ 9533, 9536, 9537, being 4 How. Stat. (2d Ed.) §§ 11417, 11420, 11421. A statement of the facts is given in the opinion of the circuit judge, pursuant to which a decree was entered dismissing the bill and granting defendants relief. It is claimed by complainants, appellants, that the facts should have been found otherwise, that in any event complainants should have a lien for the cash they actually paid to Pendock and for a demand owed by Pendock to complainant Kendricks, which it is claimed was released and was a part of the consideration paid by complainants for the lands. The opinion referred to is here set out:

"In the month of March, 1913, Edward D. Pendock who then lived in the village of Atlanta, in Montmorency county, was the owner of about 2,000 acres of land in that county and some 20 village lots in said village. These lands and village lots were all the property possessed by Pendock, produced no income, and

Digitized by Google

for some time he had been compelled to borrow money to pay the taxes thereon. The time to redeem from tax sales of some of the lands would soon expire, and for a man of his means he was heavily in debt. He was land poor. Under these conditions, and on March 22, 1913, he applied to complainants to purchase his lands.

"The complainants resided at Alpena, where Mr. McRae kept a retail furniture store. He was also a partner with Mr. Kendricks in the sewing machine, piano, organ, and some land business. Mr. Kendricks had been engaged in the sewing machine and musical instrument business for many years, and in carrying on the same he had traveled extensively through Montmorency county, was well acquainted generally with lands therein, and had known Mr. Pendock well since the year 1905, and had had business dealings with him since 1906. Mr. McRae did not know Mr. Pendock, nor anything in regard to his lands. He testified:

"'I acted entirely on Mr. Kendricks' word. My partner, Mr. Kendricks, I took his word for it. He said the timber was all on the land, and the land was worth from $15,000 to $18,000. At first Mr. Pendock asked $20,000, but in a week he dropped to $10,000 for the land, and agreed to throw the 20 village lots in Atlanta in as a "bonus."'

"This proposition was accepted by complainants, and on Saturday, March 29, 1913, two quitclaim deeds were executed by Mr. Pendock, covering all of his lands and the village lots, each upon the express consideration of $1, and delivered to complainants.

"Complainants claim to have paid $10,000 for this land and these lots, as follows: They gave their two notes for $8,000. One of these notes, for $5,000, was made payable in five years, and one for $3,000, was made payable in three years, both from date. The $2,000 remaining of the purchase price they account for in this manner: There was one mortgage of $525 and another of $300 upon the land, which complainants testify they 'assumed'; but it turned out upon further examination that they had in no manner assumed the payment of these mortgages, but had simply taken the land subject to the same, and it was further developed at the hearing herein that, at the time of the

Digitized by Google

purchase, only $49 remained unpaid upon the $300 mortgage. They claim that Mr. Pendock owed Mr. Kendricks a note of $850, which was surrendered to him; also that they indorsed Mr. Pendock's note for $100, which they used in the redemption from tax sales of the lands, and gave him $225 in cash.

"Mr. Kendricks reached Atlanta on Monday, March 31, 1913, about 5 o'clock in the afternoon, with complainant's two deeds, but on presenting the same for record to the register of deeds a mistake in the name of one of the grantees was discovered, so that the deeds were not in fact recorded until April 7, 1913. In the meantime, and on March 31st, a writ of attachment in the suit of McClenathan, administrator of the estate of Charles Powell, against Pendock, had been sued out of the circuit court for the county of Montmorency, and on April 1, 1913, duly levied upon a portion of the lands deeded by Pendock to complainants. And on April 2, 1913, writs of attachment in the several suits wherein Sleeper, McNair & Elliott, the Gaylord State Savings Bank, and the Lewiston Bank were respectively plaintiffs, and Pendock was defendant, in the same court, were issued, and on the same day levied upon the lands mentioned.

"At the October term of court, these suits proceeded to judgment in favor of the respective plaintiffs for the following sums: Estate of Charles Powell, $551; Sleeper, McNair & Elliott, $550; the Gaylord State Savings Bank, $350; and the Lewiston Bank, $250. Soon after these several writs of attachment were levied and filed of record in the registry of deeds, and before such judgments had been obtained in the suits at law, complainants filed their present bill against the plaintiffs in said attachment suits to quiet their title as against the lien created by such levy and filing under the provisions of section 10564, 3 Comp. Laws (section 13365, 5 How. Stat. [2d Ed.]). The defendants answered said bill of complaint and claimed that said lands had been so transferred by Mr. Pendock to complainants with the intent to hinder, delay, and defraud his creditors, within the knowledge of complainants at the time of such transfer.

"The question, therefore, involved for ultimate determination in this case is: Was the conveyance of

Digitized by Google

the lands in question by Mr. Pendock void within the meaning and the terms of section 9533, 3 Comp. Laws (4 How. Stat. [2d Ed.] § 11417). It is not at all necessary, in order to render a conveyance void as against existing creditors of the vendor, that actual fraud should be intended, or that the vendor should intend entirely to defeat his creditors in the collection of their claims. A purpose to hinder and delay creditors is fraudulent, although the debtor may honestly intend that all his debts shall ultimately be paid. And even if a sale is made for full value, it will be void as to existing creditors, if made by the vendor with intent to hinder or delay such creditors, and the buyer has notice of such intent, or knowledge that his purchase will enable the debtor to convert his means into such shape as will prevent the creditors from reaching them.

"'Sales on long time, or in exchange for assets not readily convertible, and not subject to levy, * * * may come within the mischief of the law.' *Jordan* v. *White*, 38 Mich. 253, 256.

"'Knowledge by a purchaser of facts sufficient to put an ordinarily prudent man on inquiry (where the sale is attacked as fraudulent as to creditors) is all that is required, and *participation* in the fraud is not necessary.' *Eureka Iron, etc., Works* v. *Bresnahan*, 66 Mich. 489, 491 (33 N. W. 834).

"'A fraudulent intent on the part of Pier & Wagley [vendors] and *notice or knowledge of such intent on the part of Hough & Wagley* [vendees], is sufficient to avoid the sale, without any proof whatever of actual fraudulent intent on the part of these latter parties.' And 'knowledge of facts sufficient to put an ordinarily prudent man on inquiry is all that is required.' *Hough* v. *Dickinson*, 58 Mich. 89, 94 (24 N. W. 809).

"'It is enough that the purchaser knows what would put a prudent man on inquiry as to the motive of the sale.' *Bedford* v. *Penny*, 58 Mich. 424, 428 (25 N. W. 381).

"Such is the settled and well-known law of the State. I have no doubt that Mr. Kendricks knew that Pendock, in making the deeds, fully intended to hinder and delay his creditors in the collection of their debts, and that such must be the necessary and inevitable consequence of the conveyances made upon such an unusual consideration as that asserted in this case. He was an intimate of Pendock for years around

Digitized by Google

Powell's Hotel, where Pendock had lived until he owed $500 for board, and Kendricks knew he was disputing with Powell the amount of this bill and could not pay it. He was associated in some business dealings with him for a series of years, and until, as he says, Pendock owed him $850, loaned in small sums, which he could not pay.

"Mr. Kendricks testified:

"'I have known Mr. Pendock ever since along about 1905. He was living at Charles Powell's when I first got acquainted with him. Indirectly, I have had some money invested that Pendock has handled, small quantities, nothing more than through letting him have some money to handle—to use. About a week before we bought, Mr. Pendock first spoke to me about it. I made no investigation about the timber, except what I took for granted, knowing Pendock as long as I had.

"'*Q.* Did you have any knowledge at this time of Mr. Pendock's indebtedness to people?

"'*A.* Why, yes; I had some idea that he owed some people; but as to what amount, or to who, I didn't. Pendock told me that he owed the Powell estate some money, but not near what they claimed, and he told me that he had a few other debts; but I knew nothing of the amounts. * * * I won't be positive whether he said he owed the bank in Hillman a little, or the bank in Atlanta a little, or whether he didn't. I don't pay much attention to those things; but he told me he owed a little money. Pendock has had money of me in small amounts since 1906 at different times. The first money I gave him in 1906 over here at Powell's to buy a piece of land that he wanted to buy; at that time Powell and I was doing business together as usual up to the time of his death. Pendock and I settled up, and I took the $850 note for the account. The note was dated in 1909.'

"Mr. Elliott testified that, in a conversation which he had with Mr. Kendricks on April 1st, 'he told me he was aware of the fact that we had a claim against Pendock. He said that Pendock told him he owed us $500, he owed the Lewiston Bank $350, and that Powell had a claim against him of $500, but he didn't owe him near that much, and the Bank of Gaylord, also, had a claim.' And I believe this statement of Mr. Elliott. I have no doubt that Mr. Kendricks knew far

Digitized by Google

more of the actual financial condition of Pendock than he is willing to or does admit. I believe he knew all about it, and surely he knew enough to have put any prudent, honest man upon inquiry, which is all the law requires.

"And Mr. McRae is affected with and held to the knowledge possessed by Kendricks in making this purchase. They both swear they were partners in this transaction, as well as in their general business of selling sewing machines and musical instruments, and dealing in lands, and no doubt such was the fact. And he knew, as he testified, that Pendock was making a 'sacrifice'; that he was selling his land for one-half its value, nominally, but actually for much less. Every fact and circumstance concerning the making of the sale by Pendock to complainants go to show a deliberate and desperate intent upon the part of Pendock to hinder, delay, and defraud his creditors, and, as well, knowledge of such intent by complainants. They knew his necessities, and his poverty so far as funds were concerned.

"He first asked $20,000 for lands which they fully believed to be worth $15,000 to $18,000. In a week he dropped to $10,000 for the lands alone, and gave the 20 village lots as a 'bonus.' For $8,000 of the consideration he accepted a note signed by complainants for $5,000, payable in five years, and another note for $3,000, due in three years. He took no mortgage or other security. He had pressing debts at the time and complainants knew it. By this transaction, 88 per cent. and more of his assets, besides the village lots, was absolutely destroyed so far as his creditors were concerned. And then Pendock disappeared and has not been heard from since. Mr. Kendricks is scarcely collectible for any amount, and Mr. McRae is a man of very limited means.

"These notes of complainants, in my opinion, could not be sold in the city of Alpena on ample notice for $500. The sale of such an amount of land upon such a long credit, without taking back a mortgage or other security, is an unheard-of and unprecedented transaction in this region. I never knew of one such before. It is an asserted sale, which, as against creditors, ought not to be permitted to stand, either at law or in equity.

Digitized by Google

"'There are circumstances so frequently attending conveyances and transfers intended to hinder, delay, and defraud creditors that they are denominated badges of fraud. These badges of fraud do not in themselves, or *per se*, constitute fraud, but are rather signs or *indicia* from which its existence may be properly inferred as matter of evidence. They are more or less strong or weak, according to their nature and the number concurring in the same case. They are as infinite in number and form as are the resources and versatility of human artifice.' 20 Cyc. pp. 439, 440.

"The well-known writer of the article of Fraudulent Conveyances then proceeds to state many 'particular badges,' and among others:

"'6. Sales on Credit.—The mere fact that a sale is made upon credit does not require that the transaction should be declared invalid; but a sale upon credit of part of his property by an insolvent debtor is a circumstance which may be considered, with others, as bearing upon the question of fraudulent intent; and an unusual length of credit is a badge of fraud. So, too, the giving of long time credit to an irresponsible purchaser without security has been considered to be a badge of fraud.

"'7. Insolvency or Indebtedness of Debtor.—Evidence of large indebtedness, or of complete insolvency, is an important element in marshaling badges of fraud to overturn fraudulent transfers; but mere indebtedness of the grantor at the time of making a conveyance is not generally of itself such evidence of fraud as will avoid a conveyance, although it is voluntary.

"'8. Transfer of All the Debtor's Property.—The transfer of all or nearly all of his property by a debtor, especially when he is insolvent or greatly embarrassed financially, is a badge of fraud.' 20 Cyc. pp. 448, 449.

"If the $850 note were an actual, honest indebtedness from Pendock to Kendricks, it should be protected in any decree which may be settled herein, unless the complainants had knowledge of Pendock's fraudulent intention, or grounds for reasonable suspicion, which, in this case, I hold that they had.

"'If a creditor purchases more than enough property to pay his debt, although he pays a consideration for the remainder, the sale will not be upheld, unless it was made under such circumstances as would validate it if made to any other purchaser; that is, unless he has no knowledge of the seller's fraudulent

Digitized by Google

intention, nor grounds for reasonable suspicion. If the sale is for an amount in excess of the debt, with the purpose on the part of the debtor to place the excess beyond the reach of other creditors, it is void, if the creditor knew of that purpose, or intended to aid the seller in secreting a part of his property from his creditors.' 20 Cyc. pp. 478, 479.

See, also, *Gumberg* v. *Truesch*, 110 Mich. 451, 453, 454 (68 N. W. 236); *Scandinavian Society* v. *Lindquist*, 133 Mich. 91 (94 N. W. 592).

"My conclusion is the bill should be dismissed and a decree settled accordingly."

To the facts thus stated should be added that none of the lands attached were appraised as high as $5 an acre. No proof was introduced by defendants concerning the value of the property, and there is no testimony upon the subject, except the value of them claimed by Pendock, the sum complainants claimed to have paid, or agreed to pay, for them, and the appraisal. The value of property owned by Pendock, other than that conveyed to complainants, does not affirmatively appear.

Certain statements of fact found in the opinion are challenged as not supported by testimony. They are:

"These lands and village lots were all the property possessed by Pendock, produced no income, and for some time he had been compelled to borrow money to pay the taxes thereon. The time to redeem from tax sales of some of the lands would soon expire, and for a man of his means he was heavily in debt. He was land poor."

"These notes of complainants, in my opinion, could not be sold in the city of Alpena on ample notice for $500. The sale of such an amount of land, upon such a long credit, without taking back a mortgage or other security, is an unheard-of and unprecedented transaction in this region. I never knew of one such before."

Defendants levied the attachment upon five parcels of land not conveyed by Pendock to complainants.

Digitized by Google

OSTRANDER, J. (*after stating the facts*). The question of fraudulent intent is made by the statute a question of fact, and not of law. Assuming that the commercial desirability or discount value of the notes given by complainants is not made to appear, and that there is no evidence of inadequacy of the price complainants agreed to pay for the lands, and dismissing these considerations as in any manner controlling decision, I am impressed, after a careful reading of the testimony, that it and the natural and necessary inferences which are to be drawn from it support the conclusion of the trial court. It may be truthfully said that the opinion delivered does not state some facts which counsel for complainants thinks qualify and make less bald and positive some of the findings. But it was for the court to draw inferences from the testimony, and I think he did not err in drawing the final and conclusive one that the transaction between complainants and Pendock was not *bona fide*.

As to complainants' contention that they ought to be protected by the decree to the extent of the consideration they actually paid, it may be answered by saying that their deed conveys to them the Pendock title to lands not levied upon by defendants. It is only as to the defendant creditors that the conveyance is held to be bad. I find nothing in the record affording the information that complainants are not amply secured for the consideration actually paid by them.

The decree is affirmed.

BROOKE, C. J., and KUHN, STONE, BIRD, MOORE, and STEERE, JJ., concurred.

The late Justice MCALVAY took no part in this decision.

Digitized by Google

SCHOOL OF APPLIED ART *v.* BUCKLEY.

1. RELEASE — CORPORATIONS — MISAPPROPRIATION OF FUNDS — OFFICIAL ACT.

   Where there was dissatisfaction with defendant's management of the affairs of a corporation of which he was secretary, treasurer, and manager, and a tripartite agreement was signed by the parties in interest settling their affairs and releasing defendant, who was withdrawing from the business, from all claims of every nature against him on account of any official acts, misappropriation of funds which he had paid to himself as salary in addition to his fixed salary, not disclosed to complainant at the time the release was signed, although an examination of the books would have disclosed it, was not an official act included in the release.

2. SAME—FRAUDULENT ISSUE OF STOCK.

   But the fraudulent issue of corporate stock by defendant, who appropriated the proceeds to his own use, was an official act from the liability for which the agreement released him.

Appeal from Calhoun; North, J. Submitted June 28, 1915. (Docket No. 19.) Decided September 28, 1915.

Bill by the School of Applied Art, a corporation, against Claude W. Buckley for an accounting and for other relief. From a decree for defendant, complainant appeals. Reversed and decree entered in this court.

Burritt Hamilton and *Stewart & Jacobs*, for complainant.

John W. Bailey and *Howard W. Cavanagh*, for defendant.

Digitized by Google

OSTRANDER, J. Complainant corporation seeks in this suit an accounting with defendant, who was for more than five years a director, secretary, treasurer, and manager of the corporation, from November 4, 1905, to March 1, 1911. It is said in defendant's brief that he did all of the work, from licking stamps to managing the business. The books, except as kept by defendant, were kept by inexperienced girls, receiving $5 or $6 a week. In April, 1911, an accountant was employed by complainant, and after spending some time preparing forms for a new system of bookkeeping began the collection of data for opening the new set of books. It is charged that he found irregularities in defendant's conduct of the business, and they are made the subject of this suit. A hearing, which we are told lasted three weeks, was concluded by a decree dismissing the bill of complaint.

The settled case, certified to contain the substance of "all the evidence in this cause," makes a printed record of nearly 1,100 pages, and counsel for defendant say, in the brief, that matter which it was understood and promised the trial judge should be incorporated is not contained therein. An omitted exhibit and the opinion delivered by the trial judge are printed in defendant's brief. Counsel for defendant have bitterly attacked one of the counsel for complainant, and this has led to reply. So far as the items of complainant's demand which are urged here are concerned, we discover in the record no evidence of any conduct of complainant's counsel which excuses defendant, or which can be characterized as reprehensible or unprofessional. The opinion of the trial court contains no analysis of the testimony, and no specific findings of fact based upon the testimony, for the reason, we assume, that in the opinion of the court the complainant, through its officers, is chargeable with notice of most of the matters now complained about, and acted after

Digitized by Google

notice, or after being chargeable with notice, in a manner to waive the right to pursue defendant with respect to them, or, by a certain release, expressly waived such right.

We think it apparent, both from the opinion of the court and from the decree entered, that an application was made of the doctrine of estoppel, and a construction given to a written instrument, which cannot be sustained. We shall assume that the trial court would have found the facts to be as we find them to be, since most of them are sustained by defendant's testimony. The specifications of complainant's demand which are most relied upon, and to which we shall give attention are:

"(1) $1,646.88 for capital stock of the par value of $2,256 which the defendant converted and sold for his own use.

"(2) $30, cash which the defendant took from the company in connection with this stock transaction.

"(3) $38.50, cash taken by the defendant as interest, likewise forming a part of the above stock transaction.

"(4) $181, cash taken by the defendant in payment of overtime which he claims to have put in for complainant company.

"(5) $857.35, cash taken by the defendant as salary (not including overtime charges) over and above the amount to which he was entitled."

A brief history of the corporation must be given. In giving it, we state what we find from the record to be the facts. It was incorporated November 4, 1905, with an authorized capital of $3,500, 350 shares of stock, at $10 each. On November 15, 1905, the total capital stock was issued in 5 certificates, certificate No. 1 to defendant for 86 shares, certificate No. 2 to defendant for 163 shares, certificate No. 3 to Cora O. Pilsworth for 99 shares, certificate No. 4 to Edward S. Pilsworth for 1 share, certificate No. 5 to Queen H. Buckley for 1 share. Meetings of directors and of

Digitized by Google

stockholders were infrequently held. There had been a pre-existing organization of the same name, the property of which was acquired by defendant through foreclosure of a chattel mortgage, who transferred it to complainant in payment for stock. The plan was to give Mr. Pilsworth (president) and wife 100 shares of stock, and defendant and his wife 100 shares. Of the remaining 150 shares, defendant was to have sufficient, at par, to pay him for his investment. The sum was computed at $644.30, and he received 64 shares. This gave him, in all, 164 shares, 1 of which he gave his wife, retaining 163. It left 86 shares, which were issued to defendant, and by him transferred to the corporation, to be sold as treasury stock. He was authorized to sell it at $5 per share, and some was sold at this price.

Under date April 10, 1907, defendant entered upon the books a charge in his favor of $430, which he says was for this 86 shares of stock at $5 a share, and issued to himself, the president also signing the certificate, 40 shares, of the par value of $400. In November, 1908, he entered a charge in his favor of $35.50, as interest on this $430. The odd $30 he drew out in cash. As the entries were made, defendant charged the stock against his labor account. This entry was erased, or crossed off, and it was charged against his cash account. It was upon the trial that he accounted for the transaction as a payment for 86 shares of stock, which he contends was his own, but transferred to the company for its convenience. In December, 1910, the capital stock was increased from $3,500 to $50,000, all of which was issued, and a bond issue of $25,000 was authorized.

Defendant had a fixed weekly salary. He paid himself $181 for overtime. No corporate action sanctioned it. The fact was actually discovered after defendant had retired from the company. Defendant

Digitized by Google

paid himself salary in excess of the amount fixed and agreed upon. The overcharge is $857.35. The fact is not disputed. It was discovered after he retired from the company.

There was friction and dissatisfaction with defendant's management of affairs. An agreement, reduced to writing, was made February 27, 1911, between defendant, George W. Buckley, his father, and Minnie M. Buckley, parties of the first part, Burritt Hamilton, who was a director of complainant and its counsel, party of the second part, and the complainant, party of the third part, one of the purposes of which was the sale and the purchase by others than the complainant of the stock of the parties of the first part for $15,000, of which $10,000 was to be paid in cash and $5,000 in mortgage bonds of the complainant. The agreement was executed. It contained the following provision:

"(c) That, after consummation of said sale of stock, this instrument shall operate as a release and discharge of all claims, if any, of every name, nature, and description whatsoever, however arising, then held by said Claude W. Buckley, against said third party, except claims arising by virtue of his ownership of bonds of said third party, and except such sums as may be found due him upon an accounting for goods, wares, and merchandise sold to said third party by the Buckley Office Outfitting Company; and this instrument shall operate in like manner as a release of all claims, if any, of every name, nature, and description whatsoever, then held by said third party against said Claude W. Buckley on account of any official acts of said Claude W. Buckley as an officer of said school, it being the intent hereof that this instrument shall operate and stand as a mutual acknowledgment of satisfaction and discharge of all such matters."

Under date July 1, 1909, certain contracts called twin service contracts were entered into between complainant and defendant and between complainant and

Digitized by Google

its president, Edward S. Pilsworth. From the beginning defendant and his family had had a controlling interest in the company. By these agreements it was sought to increase and to make equal the holdings of stock of the president and of defendant, neither to pay for the additional stock in cash but both to earn it by services to be rendered. They and their families owned, practically, the entire stock of the corporation. This agreed upon adjustment was based in part upon the fact that defendant owned the 40 shares of stock which had been wrongfully, and we find fraudulently, issued to him. The agreement, as made and executed, assumed that defendant owned a certain number of shares, including the said 40 shares, and an equal amount was given to Pilsworth, the president, and so far as appears has been since owned and controlled by him. The 40 shares of stock which defendant acquired in the manner hereinbefore described grew, by stock dividends, from $400 par value to $2,256 par value, and defendant, pursuant to the agreement referred to, sold it, with the remainder of his holdings; its proportionate part of the selling price being $1,646.88.

There is, of course, very much more concerning the dealings of the interested parties and the history of the corporation than has been stated. A considerable portion of the testimony relates to the various complaints about defendant's official and business conduct and the causes of friction between defendant and other interested parties. The reason given for entering upon this subject is that it explains what was intended to be settled by clause (*c*) of the tripartite agreement. We have no occasion to set out the testimony. It is sufficient to say that the agreement, in the light of the testimony, cannot be interpreted so as to include in the release claims for money which the defendant appropriated without authority, without advising his as-

Digitized by Google

sociates, and without their knowledge. The language employed in subdivision (*c*) of the tripartite agreement cannot be reasonably interpreted as defendant now seeks to interpret it. Usually a demand of which parties are ignorant is not embraced in a release. It is the general rule that misappropriation of corporate assets by an officer cannot be authorized or ratified. It is true that the method of bookkeeping was unscientific, making mistakes possible, if not probable. But there is no question of mistake in the act of defendant in taking money for overtime while drawing a fixed salary; none in his drawing $800 more than he was entitled to draw. These were not official acts of defendant, but were peculations of which he does not appear to have been even suspected. The fact that the sums taken were charged to him, and that the other interested parties might have caused an examination of the books to be made before entering into the tripartite agreement, do not aid defendant. He cannot complain because the other contracting parties assumed that he had been honest in the matter of drawing his salary. There was no adversary proceeding, but a mutual settlement, in which, in fact, the honesty of defendant's private account was assumed by all the others; its dishonesty known to himself.

It appears, then, that while he had access to the complainant's funds defendant wrongfully appropriated $938.35 which belonged to the corporation. He settled with and withdrew from the corporation without disclosing this fact. It was later discovered by complainant. We find no good reason for denying to complainant a decree for this sum, with interest from March 1, 1911.

Complainant's right to recover the value, and the value of the increment, of the fraudulently issued 40 shares of stock, or to recover what defendant received for it, presents a question of greater difficulty. The

Digitized by Google

corporation is not seeking to cancel the certificate of stock, but it proceeds upon the theory that the 40 shares of stock—

"remained, in equity, the property of complainant. Their increase by way of stock dividends was also complainant's property. * * * As an agent he is bound to account for this."

The act of issuing stock of a corporation is an official act. As was said by CAMPBELL, C. J., in *Hempfling* v. *Burr*, 59 Mich. 294 (26 N. W. 496):

"It is quite likely that Burr's conduct may have been official, but we are not aware of any principle which will exempt a person from personal responsibility for fraud committed in a double capacity. It is no part of official duty to commit fraud, and there are probably cases where a corporation may not be liable for the frauds of its officers."

It is the general rule, relied upon by complainant, that an agent is bound to account to his principal for all money and property which may come into his hands by virtue of the agency, and this rule embraces, not only such money and property as may be received directly from the principal, but also that which comes into the agent's hands for the principal as the result of the agency. 1 Mechem on Agency (2d Ed.), § 1327. The manager, secretary, and treasurer of a private corporation is, of course, an agent of the corporation. But an official act of his, although in his own interest, differs in some respects from a mere peculation; for example, a taking of money to which he had access by reason of his agency. Subdivision (*c*) of the tripartite agreement was drawn by a lawyer. The words, "on account of any official acts of said Claude W. Buckley as an officer of said school," must be held to mean something. No particular acts are described or defined. What was the reason for the release, unless it was suspected, or believed, or thought possible, that

Digitized by Google

defendant had officially performed some act for which he might be personally answerable to the corporation? The corporation did not, in fact, know about the fraudulent issue of the 40 shares of stock; but it did not limit its release other than by use of the general term. From the consequences of proper official conduct no release was required. We feel constrained to deny to complainant any recovery on account of the issue of stock and on account of the details which were a part of the transaction. The unexcused, and inexcusable, laches of officers of the corporation in not knowing for what consideration its stock was issued, while it is not made the ground of decision, made the loss which has occurred possible. This fact may, or may not, help the defrauded complainant to support with some equanimity a conclusion which is rested upon the contract which it made.

The decree is reversed, and a decree may be entered in this court in conformity with this opinion. Appellant will recover costs of this appeal.

BROOKE, C. J., and KUHN, STONE, BIRD, MOORE, and STEERE, JJ., concurred.

The late Justice MCALVAY took no part in this decision.

Digitized by Google

CORNELL v. NORTON.

1. VENDOR AND PURCHASER—TAXATION—STATE TAX DEED.
   The vendee in a land contract was justified in paying the taxes which it was the duty of the vendor to pay, where the same appeared to be a lien upon the land, although the tax sale and deed issued to him thereunder were void.

2. SAME—FORFEITURE—REDEMPTION—EQUITY.
   Complainant purchased 160 acres on a land contract, agreeing to pay therefor $400 in annual instalments of $100 each, with interest. Defendant agreed to convey the land by warranty deed subject to all taxes assessed for and after 1895. The contract provided that on failure of the vendee to perform, the vendor might elect to be discharged from his covenants and forfeit the payments and all improvements made. Complainant made valuable improvements, but failed to pay any part of the purchase price. He acquired a tax deed from the State for the taxes of 1894, which it was defendant's duty to pay, and claimed to own the premises thereunder on advice of eminent counsel, although said deed is now admitted to be void. Defendant, after waiting for 11 years, declared the contract forfeited and brought ejectment, and complainant seeks to restrain the suit at law and to be allowed to redeem from the forfeiture. *Held*, that the decree of the court below allowing the complainant to redeem by paying the purchase price, with interest, together with the taxable costs of the ejectment suit and costs of this suit, less the amount of the taxes of 1894, with interest, should be modified to include an allowance of $50 beyond the taxable costs in the ejectment suit.

Appeal from Ontonagon; O'Brien, J., presiding. Submitted June 22, 1915. (Docket No. 109.) Decided September 28, 1915.

Bill by Albert S. Cornell against Denis J. Norton to redeem from the attempted forfeiture of a land contract and to enjoin the prosecution of an action of

Digitized by Google

ejectment. From a decree for complainant, defendant appeals. Modified and decree entered in this court.

Walter G. Van Slyck (*John A. Brooks*, of counsel), for complainant.

John Jones, for defendant.

STONE, J. The bill in this cause was filed to redeem from the attempted forfeiture of a land contract, and to enjoin the prosecution of an action of ejectment. On October 26, 1895, complainant and his son, Bernard H. Cornell, and the former's brother, Edwin E. Cornell, entered into a written contract with defendant, whereby the latter agreed to sell to them 160 acres of land in Ontonagon county for the sum of $400, payable in annual installments of $100 each, beginning June 1, 1897, with interest payable annually on all sums unpaid, upon the performance of which conditions defendant agreed to convey the land to them by warranty deed, subject to all taxes assessed for and after 1895. The contract further provided that:

"On the failure and neglect of said parties of the second part to do or perform anything herein specified to be done and performed on their part, the said party of the first part may elect to consider himself released and discharged of and from any and all liability in any of the covenants specified to be done and performed on his part, and all payments and improvements made by the said parties of the second part shall be deemed forfeited without further notice, as stipulated damages for nonperformance of contract."

On May 25, 1897, defendant, by writing indorsed on the contract, extended the time for the first payment until June 1, 1898. No part of the purchase price has ever been paid. Complainant went into possession under the contract, and has been in possession ever since. During this time he has cleared a part of the land, erected buildings thereon, and paid the taxes. The value of his improvements is variously estimated.

Digitized by Google

The circuit judge, who heard the testimony, found that they were worth $1,500. At the date of the contract the land was what is known as "stump land," and, while there is some conflict in the testimony, it appears that $400 was a fair value of the property at that time. It has increased in value since.

On September 24, 1903, Edwin E. Cornell quitclaimed his interest in the land to complainant, and on September 6, 1910, Bernard H. Cornell assigned to complainant all of his interest in the contract. On December 4, 1897, complainant and Edwin E. Cornell, having learned that the land in question had been sold to the State for the taxes of 1894 (taxes which it was the duty of defendant to pay, by the terms of the contract), purchased the rights of the State under such tax sale, and, the redemption having expired on November 2, 1898, they received from the auditor general the usual State tax land deed. The consideration for this purchase was the sum of $12.02. On April 25, 1898, complainant and Edwin E. Cornell caused to be served upon defendant, as the grantee in the last recorded deed to said premises, a notice of such purchase, and of defendant's right to redeem within six months, proof of which service was filed with the county clerk. Under the evidence this notice, the deed and the tax sale were void, but that was not known by the parties at the time, and the fact is not very material here. On April 30, 1898, complainant caused a letter to be written to defendant, stating that he had bought the State bid for the 1894 tax, and had caused the sheriff to serve notice of the fact, "as we are required to do by law, as we understand the law." The letter further stated:

"We bought the tax bid to protect ourselves, not with the expectation of getting the place on a tax title. Nor do we expect you to pay more than the original tax."

Digitized by Google

Within a few days after the expiration of the six months' notice defendant tendered to complainant an amount supposed to have been sufficient to redeem from the tax deed, which complainant refused to accept, claiming that it came too late, and that he was then the owner of the land. Complainant claims, however, that this tender was accompanied by a demand that he execute a quitclaim deed of the premises, but this is denied by the defendant. As above stated, the complainant has ever since remained in possession of the premises, cultivating and improving the same in the belief and under the claim, until about the time of the hearing, that he owned the same. During all of this time defendant resided in the immediate neighborhood, meeting complainant frequently, and the latter testified that defendant never made any demand upon him for the payment of the purchase price of the premises. Defendant denied this, and testified that he did demand payment, but fixed no time or place of such demand.

In the early part of 1899 complainant submitted the question of his rights under this contract and tax title to able counsel, and was advised in letters, which appear in the record, that as complainant was under no obligation under the Michigan decisions to pay the tax of 1894, there was nothing to preclude him from purchasing said tax title; that, if the tax title was valid and regular, he could hold the land; that any attack upon its validity would have to be made before complainant had been in possession for five years; and that, if it should eventually be held bad, complainant would still be entitled to pay up the amount due on his land contract, and obtain his deed. Matters ran along in this condition until on or about May 16, 1910, when defendant served on complainant a notice, of which the following is a copy:

Digitized by Google

"To ALBERT S. CORNELL and BERNARD H. CORNELL:

"Please to take notice that by reason of the failure on your part to perform the covenants and agreements by you to be performed under the provisions of a certain agreement in writing entered into the twenty-sixth day of October, A. D. 1895, by and between the undersigned, as party of the first part, and Albert S. Cornell, Edward E. Cornell, and Bernard H. Cornell, parties of the second part, wherein the undersigned did agree to convey to the above-mentioned Albert S. Cornell, Edward E. Cornell, and Bernard H. Cornell the following described real estate, viz., all that certain piece or parcel of land situate and being in the township of McMillan, in the county of Ontonagon, and State of Michigan, and described as the northwest quarter of section thirty-five (35), in township forty-eight (48) north, of range forty (40) west, in that you have utterly failed, neglected, and refused to pay to the undersigned any part of the purchase price of said described land as provided in said agreement, and have utterly failed, neglected, and refused to pay to the undersigned any of the interest upon said purchase price, the undersigned has elected to consider himself released and discharged of and from any and all liability on any of the covenants specified to be done and performed on his part, and the undersigned does hereby elect to consider himself so released and discharged, and the undersigned does hereby declare the said agreement and all of your rights thereunder forfeited by you for the reasons above set forth and for the reason that you have failed and refused to fulfill and perform the agreements which by the terms of said agreement were to be fulfilled and performed by you.

"And you will also please take notice that you are hereby required to quit, surrender, and deliver up possession to me of the premises hereinbefore described, which you now hold of me as my tenant, on or before the 20th day of August, A. D. 1910, for the reason that I intend to terminate your tenancy and repossess myself of such premises on the date above mentioned.

"Dated this 16th day of May, A. D. 1910.

"DENIS J. NORTON."

In September following defendant commenced an action of ejectment against complainant and Bernard

Digitized by Google

H. Cornell in the circuit court, whereupon this bill was filed to restrain the prosecution of such suit, setting up, in addition to the foregoing facts, that complainant's possession under his tax deed had been open, notorious, and adverse for a period sufficient to give him title by adverse possession under the statute, and asking that his title be quieted as against defendant, or, in lieu of such relief, that the attempted forfeiture of the land contract be set aside, and complainant permitted to redeem therefrom upon such terms as should be just and equitable, and also praying for general relief.

By the record it was conceded by defendant's counsel that between the time of the service of the attempted forfeiture notice, and the filing of the bill of complaint there was no unreasonable delay. Defendant first demurred to the bill, which was overruled. Later defendant answered, denying the claimed equities and allegations of the bill. The case, being at issue, was heard upon testimony taken in open court. A decree was entered permitting complainant to redeem from the forfeiture by paying to defendant, within 60 days from the date of the decree, or, in case of an appeal by defendant, within 60 days after the affirmance of the decree in this court, the full amount of the purchase price, with interest, together with the costs of the ejectment suit, and of this suit, less the amount of the taxes of 1894, with interest, in default of which payment defendant should be entitled to a decree dismissing the bill. From this decree defendant has appealed.

Although at the time the bill of complaint was filed complainant was claiming to own the land by virtue of his tax deed, at the hearing it appears that he testified that he was then willing and anxious to pay the principal sum of the contract, with interest, less the taxes of 1894, and interest.

While the tax sale and deed were void, the tax ap-

Digitized by Google

peared to be a lien upon the land and the complainant was justified in paying it. After the service of the notice of forfeiture, it is established by the evidence that there were some negotiations between the parties, and the complainant offered to pay $300 in settlement, but this offer was refused by defendant.

In the written opinion of the learned circuit judge he said:

"It is the claim of the complainant that there will be no injustice upon the defendant if the complainant is permitted to redeem from the forfeiture of the contract by paying the amount due under its terms, together with the legal interest thereon. In reply to this claim of the complainant, the defendant contends in his answer that all of the rights of the complainant in the land contract should be forfeited; that there has been a legal and valid notice of forfeiture served upon the complainant and other vendees. The defendant contends that the complainant has placed himself in such a position by his long claim of ownership under the tax title, and by his insistence upon said claim in his bill of complaint, and by his failure to make any effort to comply with the terms of the contract, and by his complete and unequivocal repudiation of all of his obligations under the contract, as well as by his surreptitiously endeavoring to acquire a title adverse to his vendor, he could have no standing in a court of equity, and that to suspend and enjoin the legal right and remedy of the defendant to proceed with his ejectment case and relieve the complainant from the effects of the forfeiture of the contract, the complainant should come into court showing some special and significant equities, and that in this case it cannot be said that the complainant has any equitable standing at all, but, on the contrary, by his actions and attitude places himself entirely beyond relief in a court of equity. On the other hand, the complainant claims that the defendant, by serving a notice of forfeiture upon the complainant, recognized the interest of complainant in the land contract; that, as a matter of fact, the defendant has not been in any way injured by any act of the complainant; and that, if the defendant should be paid

Digitized by Google

the full amount of the purchase price, together with interest thereon, he will not suffer any wrong or injustice.

"I am of the opinion that the complainant should be permitted to redeem. He has made substantial improvements upon the land to the knowledge of and without any interference upon the part of the defendant. While the complainant was undoubtedly guilty of reprehensible conduct in purchasing the State bid and acquiring the tax deed thereon, and afterwards pretending to the defendant that he did not intend to acquire the title to the land against the defendant's rights, but simply to protect both of them, yet it cannot be said that this conduct of the complainant has in any way injured the defendant. At the expiration of the six months after the tax notice was served upon him the defendant knew that the complainant pretended to claim the premises under the tax deed; yet the former took no steps to disturb the complainant in his possession of the premises for the period of eleven years thereafter. Under the circumstances, I cannot see that the maxim the 'one who comes into equity must come with clean hands' should have any application to this case. The complainant, in claiming the land during all of those years under his so-called tax title, acted in pursuance of the advice of a reputable and distinguished lawyer. To defeat the complainant now would, in effect, be to forfeit all of his improvements and the taxes that he has paid ever since he entered into possession of the land. The maxims of equity should not be permitted to harden into rigid and formal doctrines. If equity is to work substantial justice, it must remain free and plastic, within reasonable limits. Equity will not render aid in enforcing a forfeiture, but will interpose to relieve from them"—citing cases.

We are of the opinion that the conclusion of the court below finds support in the following cases in this court: *Stickney* v. *Parmenter*, 35 Mich. 237; *Hodges* v. *Buell*, 134 Mich. 162 (95 N. W. 1078); *John* v. *McNeal*, 167 Mich. 148 (132 N. W. 508).

However, as complainant is seeking relief against a forfeiture, he should pay sufficient to make the defend-

Digitized by Google

ant whole. Defendant had brought a suit in ejectment. He was allowed in the court below the taxable costs only, in that case. Considering all the circumstances, we think an allowance of $50 beyond the taxable costs in the ejectment suit should be allowed and paid to defendant, and the decree will so provide. In all other respects the decree of the circuit court is affirmed.

We think that neither party has any claim to costs in this court, and none will be awarded.

BROOKE, C. J., and KUHN, OSTRANDER, BIRD, MOORE, and STEERE, JJ., concurred.

The late Justice MCALVAY took no part in this decision.

MESLER v. JACKSON CIRCUIT JUDGE.

1. MANDAMUS—ORDER OF COURT—MOTION TO SET ASIDE—PRACTICE.
   Mandamus will not lie to compel a circuit judge to vacate an order unless application for such relief has first been made to him.

2. DIVORCE—ALIMONY—AGREEMENT BETWEEN HUSBAND AND WIFE—CONTEMPT.
   A sum awarded to the wife by the court, on granting her a divorce, in pursuance of an agreement between the husband and wife, after their separation, whereby he was to pay her a certain sum monthly, and intended for her support and maintenance out of her husband's estate, is alimony, the payment of which may be enforced by contempt proceedings.

3. SAME—PERMANENT ALIMONY—DIVISION OF PROPERTY.
   "Permanent alimony" is a provision for the support and

Digitized by Google

maintenance of a wife out of her husband's estate during her lifetime, ordered by a court on decreeing a divorce; "alimony" being essentially a different thing from a division of property of the parties.

4. SAME—JURISDICTION—EQUITY—PLEADING.
The equity court has jurisdiction, in an action for divorce, where the petition contains a prayer for general relief, to adjust and settle the rights of the parties with respect to the nature and amount of the alimony, and, in doing so, to confirm any agreement of the parties that is just and reasonable, and not the result of fraud and coercion.

5. SAME—CONTEMPT—STATUTES.
Act No. 230, Pub. Acts 1899, authorizes contempt proceedings in divorce cases.

6. SAME—ALIMONY—PERSONAL DECREE—INTEREST IN PROPERTY.
An award of alimony ordering defendant to pay a certain sum monthly is a personal decree, and not necessarily an interest in property, and is not in conflict with the underwriting on the subpœna served on defendant in the divorce suit, reciting that a personal decree was sought against him and that the bill was not filed to reach interests in property.

Mandamus by Arthur M. Mesler against James A. Parkinson, circuit judge of Jackson county, to compel respondent to vacate an order adjudging that relator pay certain sums as alimony, solicitor's fee, and costs, awarded in the divorce proceedings of his wife, Maud Z. Mesler, and that in default an order of contempt be entered in said court. Submitted June 22, 1915. (Calendar No. 26,266.) Decided September 28, 1915.

John Emmet Sullivan, for relator.

McHugh, Gallagher, O'Neil & McGann, for respondent.

STONE, J. The relator filed a petition for a writ of mandamus to compel respondent to vacate an order made on January 1, 1914, ordering and adjudging that relator pay to Maud Z. Mesler, his former wife, the

Digitized by Google

sum of $368, being permanent alimony and interest thereon, due under a decree for divorce theretofore entered by respondent, and that relator pay the further sum of $25 as solicitor's fee for services in such proceedings, and also $15 for the costs and expenses of Maud Z. Mesler in such matter within 30 days, and that in default of the payment of said sums that said relator be adjudged to be in contempt of court, and that an order of contempt be entered in said court.

The relator represented that on January 13, 1910, the said Maud Z. Mesler filed a bill for divorce in the circuit court for the county of Jackson, in chancery, against him, upon the grounds of extreme cruelty, nonsupport, and adultery. The bill prayed for alimony, both temporary and permanent, and for such further relief as should be agreeable to equity and good conscience:

The twelfth paragraph of the bill was as follows:

"Your oratrix further shows unto the court: That about July, 1908, defendant had been contributing nothing whatever to the support of your oratrix, and that she had consulted with the prosecuting attorney about having a warrant issued for him for nonsupport, and that their property matters were adjusted by his making an agreement to pay her $300 at the rate of $10 a month until the $300 should be paid. He partly carried out this agreement, and paid thereon about $60, and that there is a balance due her under the agreement of $240 and interest. That he has refused since to pay anything towards her support, although of sufficient ability so to do, and has grossly, cruelly, and wantonly neglected to provide a suitable maintenance for your oratrix, and that she has been compelled to work and earn her own living, although her health is impaired and not as good as it ought to be. That it has been impaired, and she believes permanently."

That a writ of subpœna was issued and duly served upon relator on January 24, 1910. That this writ was

Digitized by Google

in the usual form and had on it the following underwriting, to wit:

"*Underwriting.* A personal decree is sought against the defendant, Arthur M. Mesler, for a divorce, and the bill is not filed to reach interests in property, and not to obtain further relief against the remainder of the defendants."

That the said bill was taken as confessed, and on July 13, 1910, a decree was duly entered in favor of complainant, dissolving the said marriage, and containing the following provision:

"It is further ordered, adjudged, and decreed that the said defendant, Arthur M. Mesler, having, as appears by Exhibit C on file in this cause, on the 3d day of July, 1908, undertaken and agreed in writing to pay to the said complainant the sum of $360, at the rate of $10 per month, commencing July 16, 1908, without interest, and that the said defendant has not complied with said agreement in full, but has paid only $40 thereon, and that the balance of $320 is unpaid, it is ordered, adjudged, and decreed that the said defendant pay to the said complainant the said sum of $320 and interest thereon at the rate of 5 per cent. per annum until the same shall be paid in full."

In the month of August, 1913, Maud Z. Mesler made an application to the respondent for an order upon said relator to show cause why an attachment should not issue against him and he be punished as for a contempt, by reason of his neglect in not paying said several sums of money mentioned in the said decree of July 13, 1910. Said application represented that a certified copy of the decree had been served on the relator, and a demand made for payment of said moneys, and that the same remained unpaid. An order to show cause was issued by the respondent and duly served on the relator, who appeared and answered that he did not know the contents of said decree until December 17, 1910, when a certified copy was served upon him; that until then he did not know that he was ordered by a

Digitized by Google

decree to pay any sum of money. He represented his inability to pay the same, or any part thereof. He further denied that he had been guilty of contempt of court, for the reason that he had been unable to pay the amounts ordered in the decree to be paid, and also for the reason that the sums mentioned in said decree, and thereby ordered to be paid, were not properly matters to be adjudged and ordered in a decree for divorce, excepting the solicitor's fees and costs, and in any adjudication of alimony the payment of the same could not be enforced by contempt proceedings.

After a hearing of the parties, and on the 1st day of January, 1914, the respondent entered an order reciting the proceedings and the appearance of the parties before him, that arguments had been made and briefs filed by solicitors for the respective parties, and the fact appearing that no part of the said sum of $360, mentioned in the decree, had been paid after demand, the order concluded in substance as stated by relator in his petition, as aforesaid.

Numerous objections and exceptions were filed by relator to the entry of this order, but no motion seems to have been made to vacate the same. It is urged that the said order, by its terms, amends the decree by making the payment aforesaid ordered and decreed as alimony, whereas the said decree is silent as to the same; that the said order is contradictory of and inconsistent with said decree, as the said decree refers to a certain contract made and entered into between the parties hereto a long time prior to the beginning of said suit, wherein and whereby said complainant waived and surrendered her right to alimony in case a suit for divorce was commenced; and because the court cannot enforce the payment of said sum by contempt proceedings, because it is a mere debt, and because defendant has by his showing made it appear that he is unable to pay said amount, and because the subpœna

Digitized by Google

served on defendant in the case states that no decree affecting property is sought by complainant, and this order undertakes to compel defendant to pay over to complainant $368 of his money.

In his opinion filed by the respondent upon said proceeding, and referring to the said sum of money, he said:

"It [the agreement] was executed by the parties after their separation and provided for the payment of $360 at the rate of $10 per month by the defendant, and was to be received by her on account of her releasing him from all claim against him as her husband for support, maintenance, alimony, either temporary or permanent, suit money, solicitor's fees, etc. See paragraph 6 of that agreement. Apparently that was deemed a suitable sum to pay her because of their marriage relation and the separation, and was not the confession of any pecuniary indebtedness on his part, nor was she to receive it in payment or satisfaction of any indebtedness. Had no such agreement been made, the court might have fixed upon its terms as a proper award of alimony. Should the defendant escape its payment because the court adopted it, simply because the court by the decree did not use the term 'alimony'? The purpose of the award seems to be sufficiently evident. The decree refers to Exhibit C as being on file in the cause, and that agreement provides for those payments to be made for complainant's support and maintenance, or in consideration of her releasing him from support, maintenance, alimony, etc., and I think it is sufficiently plain, although it might have been stated more plainly, that her sum so awarded in the decree was out of the defendant's property and for alimony; and that in this respect it is within the jurisdiction of the court and that the authority of the court was lawfully and properly exercised. In attempting to give force and effect to that agreement in and by the decree, the court made it the duty of the defendant to do the very thing he had promised to do, and I do not quite see why he should be excused because the court adopted as his duty the very thing he had assented to and prescribed. The decree accom-

Digitized by Google

plishes the same end that the agreement seeks. * * * It seems to me that it is a necessary inference that such fulfillment of the undertakings on his part in that agreement, being for alimony, is virtually decreeing alimony to her, and that defendant is not in any wise misled. I therefore hold that he should be required to make these payments, and for failure so to do should be adjudged in contempt, unless there is some other valid reason for not so adjudging."

The writ of mandamus might properly be denied, for the reason that no application was made by the relator to respondent to set aside the order complained of. *Hitchcock* v. *Circuit Judge,* 97 Mich. 614 (57 N. W. 189); *Freud* v. *Circuit Judge,* 131 Mich. 606 (92 N. W. 109); *Bennett* v. *Circuit Judge,* 181 Mich. 700 (148 N. W. 162), and cases there cited. However, as the case is fully briefed upon the merits, and presents a question of some importance. we are inclined to dispose of it on its merits.

The claim is made by the relator that the sum awarded by the court in pursuance of the agreement referred to is not alimony in the proper sense of that term. We do not agree with counsel in that regard. We think it clearly appears that the sum ordered to be paid was intended for the support of the wife. Permanent alimony has been defined as a provision for the support and maintenance of a wife out of her husband's estate during her lifetime, ordered by a court on decreeing a divorce. The award of alimony is essentially a different thing from a division of property of the parties. See Black's Law Dictionary, under the title of "Alimony."

We have examined the authorities cited by counsel for relator to the effect that the court has no jurisdiction to settle claims of a wife against her husband for her separate property in a divorce suit, but we do not think these authorities are controlling of the question here. In the case of *Julier* v. *Julier,* 62 Ohio St. 90

Digitized by Google

(56 N. E. 661, 78 Am. St. Rep. 697), it was held that in an action for divorce, properly instituted, where the petition contains a prayer for general relief, the court has jurisdiction to adjust and settle the rights of the parties with respect to the nature and amount of the alimony that shall be awarded and the terms and conditions of its payment, and in doing so to confirm any agreement of the parties concerning the same that appears to be just and reasonable, and render a decree in conformity therewith.

As early as the case of *Randall* v. *Randall*, 37 Mich. 563, it was held that when a separation between husband and wife had actually taken place, or when it has been fully decided upon, it is competent for the parties to make a suitable provision for the maintenance of the wife and children, where such arrangements are fair and equal and are not the result of fraud and coercion. Such seems to have been this agreement. The respondent distinctly found that the agreement was made after the parties had separated. The right to institute contempt proceedings in divorce cases is to be found in Act No. 230, Pub. Acts 1899. That act has been construed by this court in a number of cases. See *Judd* v. *Judd*, 125 Mich. 228 (84 N. W. 134); *Brown* v. *Brown*, 135 Mich. 141 (97 N. W. 396). In *Mayer* v. *Mayer*, 154 Mich. 386 (117 N. W. 890, 19 L. R. A. [N. S.] 245, 129 Am. St. Rep. 477), it was held that this statute did not authorize such proceedings in a case brought in this State to enforce a decree for alimony made by a court of another State.

It is also urged by relator's counsel that the respondent had no authority to make the provision referred to in the decree and to make the order complained of, because of the underwriting on the subpœna. An award of alimony, when made, as in this case, is a personal decree, and not an interest in property necessarily. The relator was informed that a personal de-

Digitized by Google

cree was sought against him for a divorce, and that the bill was not filed to reach interests in property. We do not think that the relator could have been misled by the underwriting, and are of the opinion that it was sufficient to confer upon the court the authority to make the decree complained of. It may be proper to state that in the original decree provision was made for the payment by relator to the said Maud Z. Mesler of the sum of $200, being personal estate of hers that came into his hands. The respondent in the contempt proceedings distinctly held that that portion of the decree was void, and no attempt has been made to enforce it in these proceedings.

For the reasons given, the writ of mandamus is denied, with costs to the respondent.

BROOKE, C. J., and KUHN, OSTRANDER, BIRD, MOORE, and STEERE, JJ., concurred.

The late Justice MCALVAY took no part in this decision.

DYER v. PEOPLE'S ICE CO.

1. APPEAL AND ERROR—EXCEPTIONS—NEW TRIAL.
   In the absence of exceptions to the decision of the court below, this court cannot review the action of the circuit judge in overruling a motion for a new trial on the ground that the verdict is against the great weight of the evidence and grossly excessive.

2. EVIDENCE — STATEMENT OF FACT — CONCLUSIONS OF WITNESS — ANIMALS.
   In an action for personal injuries caused by a runaway

Digitized by Google

horse, testimony of the driver that the horse was not a quiet horse, that he was a bad actor, was nervous, and would start off with every little sound, was not inadmissible as a conclusion of the witness, but may be said to be a statement of a fact, since he stated in detail the conduct of the horse.

3. SAME—NOTICE—HEARSAY—ANIMALS—VICIOUS CHARACTER.
Evidence of the driver that he had, prior to his taking charge of the horse, heard that he was a bad actor and had run away, was admissible as tending to show notice of the vicious character of the horse.

4. SAME—APPEAL AND ERROR.
Where defendant's witness had already testified that he could not remember the bridle that the horse wore on the day of the injury, it was not error for the court to exclude an answer to a question asked witness whether he had furnished a bridle that would be loose on the horse's head.

5. TRIAL—INSTRUCTIONS.
Where the substance of requests to charge was given in almost the exact language of the requests, no error was committed in refusing to charge as requested.

6. NEGLIGENCE—INFERENCE—INSTRUCTIONS.
In an action for personal injuries caused by a runaway horse, a charge that negligence may be inferred from the circumstances of the case, that the jury were at liberty to draw the inference of negligence from all the circumstances, if they should find that they warranted such inference, and that the whole question of inference that was to be drawn was a question for the jury, was correct.

Error to Wayne; Hosmer, J. Submitted June 16, 1915. (Docket No. 55.) Decided September 28, 1915.

Case by Agnes F. Dyer against the People's Ice Company, a corporation, for personal injuries. Judgment for plaintiff. Defendant brings error. Affirmed.

E. T. Berger, for appellant.

Charles T. Wilkins, for appellee.

Digitized by Google

STONE, J. This is an action on the case to recover damages for injuries inflicted upon the plaintiff by a runaway horse belonging to the defendant. The defendant is, and at the time of the grievances complained of was, a domestic corporation engaged in the manufacturing business at Detroit. In such business it owned and kept at its stables a number of horses and wagons, among them a horse called the "Louie horse," and a single ice delivery wagon, used in delivering ice to its customers in the city. The declaration alleged, and on the trial there was evidence tending to show, that it was well known to the defendant that said horse was a high-strung, nervous, and irritable animal, and that upon the occasion of the injury complained of the horse wore a bridle which was too large for it, which permitted the bits to drop out of its mouth when not being driven.

On September 30, 1912, this horse and wagon, while in charge of one Charles Dunlap, defendant's driver, were left standing on Randolph street, the horse hitched to a weight only, while the driver, as was his custom, entered a place for his regular midday lunch. When Dunlap came out of the place where he had lunched, the horse had the bridle pulled off its head, and had it under his feet. Dunlap ran toward the horse, the door slammed, and the horse started, and he was unable to stop the horse. It ran on Cross street to John R. street, Dunlap trying unsuccessfully to stop it; but there was no way in which to hold it, as the bridle was off and between its legs, with the weight still attached to the bridle. The horse ran up John R. street, across Adams, to Elizabeth street, turned westerly towards Woodward avenue, and, in turning, swung across the sidewalk on Elizabeth street and over the curb, and ran against and upon the plaintiff, who was kneeling upon the grass fixing some curtains on a stretcher in front of her house, on the corner of John

Digitized by Google

R. and Elizabeth streets, inside her lot line, and between the sidewalk and her house. The horse struck the house; one shaft of the wagon and one leg of the horse going through the window, the horse remaining outside. The horse ran against the plaintiff's back, and knocked her down, and underneath the horse and wagon. She was trampled upon by the horse and severely injured. She sustained comminuted fractures of both the bones of her right leg. The fibula had a comminuted fracture about 2½ inches above the ankle. The larger bone was badly crushed and fractured 4 to 6 inches, a spiral fracture, and she was bruised about the knee. There was a bruise on the left leg about halfway between the thigh and the knee. The left ankle was badly bruised and scraped, and the skin corroded halfway to the knee. Her hip and back were bruised, and the zygomatic arch on the left side of her face was broken, depressed, and pushed in, making mastication very painful. Plaintiff was confined to her bed for about 15 weeks, and was then able to sit up. She afterwards used a wheel chair for a time, and has since gone on crutches. The right leg is now about three-quarters of an inch shorter than formerly. She was a married woman, 42 years old at the time of the injury. Her husband died before the trial.

The evidence tended to show that prior to the accident the plaintiff was a strong, healthy woman. Since the injury she has suffered much pain in her head, back, spine, and left leg, is nervous, and does not sleep well, and is unable to perform any labor. Her doctors' bills were upwards of $335, at the time of the trial, which was in November, 1914. Before and at the time of the injury she was earning from $18 to $26 per week keeping boarders and doing fine laundry work. There was much medical testimony by the attending physicians as to the extent and result of the plaintiff's injuries. Upon the trial the plaintiff called the de-

Digitized by Google

fendant's driver, Dunlap, as a witness for cross-examination under the act of 1909. The trial resulted in a verdict and judgment for the plaintiff of $5,000. A motion for a new trial was made by the defendant, and denied, but no exceptions were taken to the decision refusing such motion. The defendant has brought the case to this court, and has assigned error upon the following grounds:

(1) Because the verdict is against the great weight of the evidence.
(2) Because the verdict is grossly excessive.
(3) Because the court erred in the admission of certain testimony, and in the charge.

The first two reasons are based upon the denial of defendant's motion for a new trial, and could not be raised otherwise. In the absence of exceptions to the decision refusing the motion, we cannot review the action of the circuit judge in overruling the motion for a new trial. It has been so held repeatedly. *Ginn* v. *Coal Co.*, 143 Mich. 84 (106 N. W. 867, 107 N. W. 904); *Moore* v. *Insurance Co.*, 143 Mich. 424 (106 N. W. 1116). We will say, however, that an examination of the entire record satisfies us that, had exceptions been taken to the denial of motion, they would not have been availing, for the reason that upon the merits we are of the opinion that it cannot be said that the verdict was against the great weight of the evidence, or that the verdict was grossly excessive. The foregoing statement of the nature and extent of the injuries shows that the plaintiff was permanently disabled, and her earning ability destroyed, to say nothing of the accompanying pain and suffering. Under such circumstanaces it cannot be said that the recovery was excessive.

It remains for us to consider such of the rulings upon the admission of testimony and the charge as are properly presented and are meritorious.

Digitized by Google

The fourth assignment of error is to the effect that the court erred in refusing to strike out the following testimony of the witness Dunlap, the defendant's driver, on whose negligence the action is largely based:

"*Q.* Had you known that horse around the barn before you took him out, and given to drive about a week before the accident?

"*A.* I just heard about him.

"*Q.* Did you hear him talked around the barn as the 'Louie horse'?

"*A.* Yes.

"*Q.* What sort of a horse was he? State whether he was a quiet horse, or not a quiet horse.

"*Defendant's Counsel:* I think that is a question for the jury to decide.

"*Q.* Whether he was a quiet horse or not?

"*The Court:* Answer the question.

"*Defendant's Counsel:* I think we should find out what he did and did not do; how the witness used this horse, left him standing or not; and, if so, whether he ran away before.

"*The Court:* Answer the question.

"*Defendant's Counsel:* Note an exception.

"*A.* He was not a quiet horse.

"*Q.* He was not a quiet horse?

"*A.* No.

"*Defendant's Counsel:* I would ask to strike it out as calling for a conclusion, a question that the jury should be allowed to pass upon.

"*The Court:* Motion denied.

"*Defendant's Counsel:* Note an exception.

"*Q.* He is what is called a bad actor?

"*Defendant's Counsel:* I object to that question as incompetent, irrelevant, and immaterial, a question for the jury to decide from the facts as might appear in evidence.

"*The Court:* Answer the question.

"*Defendant's Counsel:* Exception.

"*Q.* He is what is called a bad actor, known as a bad actor?

"*A.* He was called a bad horse around the barn?

"*Defendant's Counsel:* Move to strike it out as calling for a conclusion and hearsay evidence.

Digitized by Google

"*The Court:* Let it stand.
"*Defendant's Counsel:* Exception.
"*The Court:* You were acquainted with the horse and drove him?
"*A.* Yes.
"*The Court:* He says that he was not a quiet horse.
"*Q.* State whether he was a nervous horse.
"*A.* Yes, he was nervous. He was easily excited, if you call that nervous.
"*Q.* Isn't it a fact, if you wanted to approach him from behind, you would have to be careful how you would go up to him, he would start off?
"*A.* He would start off with every little sound coming from the door; that is, he was accustomed to that.
Defendant's Counsel: Move to strike it out, as not responsive and calling for a conclusion. It is a question for the jury."

It will be noted that no exception was taken to the refusal to strike out the last portion of the testimony; but upon the merits of the question we are of the opinion that there was no error in the rulings. Whether answers are conclusions, or statements of fact, is sometimes a close question. The language of Justice CAMPBELL in *Kelley* v. *Richardson,* 69 Mich. 430, 436 (37 N. W. 514), as quoted by us in *Eesley Light, etc., Co.* v. *Power Co.,* 172 Mich. 78, at pages 86 and 87 (137 N. W. 663), is pertinent here. Impressions of personal qualities are constantly acted on as facts, and to say that a horse was nervous or quiet may be said to be the statement of a fact. But in this instance the witness stated in detail the conduct of the horse.

The seventh assignment of error is based upon the admission and refusal to strike out the following testimony of the witness Dunlap:

"*Q.* You had heard, prior to your taking charge of the horse, you had heard of his running away?
"*A.* I had heard of his running away.

Digitized by Google

"*Defendant's Counsel:* I move to strike it out as hearsay, and I will take an exception.

"*Plaintiff's Counsel:* Your honor will see that we are asking this witness as one of the employees of the company, a driver of this kind; it shows the witness' knowledge of what the horse was.

"*The Court:* All right.

"*Q.* You had heard that he had run away several times prior to the time you took charge of him?

"*The Court:* What is the object of that?

"*Plaintiff's Counsel:* That he knew he had run away prior to this time.

"*The Court:* Answer the question.

"*Defendant's Counsel:* I would like to make an objection to that question, as calling for hearsay, and incompetent, irrelevant and immaterial.

"*Q.* It had been called to your attention several times that the horse was a bad actor and a runaway?

"*A.* Yes, he had.

"*Defendant's Counsel:* I have never seen a more willing witness, and take exception to any remarks of that kind. I move to strike out the answer.

"*The Court:* Let it stand.

"(Objected to as hearsay.)"

This evidence was admissible as tending to show notice of the vicious character of the horse. *Robbins* v. *Magoon & Kimball Co.*, 186 Mich. 672 (153 N. W. 13).

What we have already said applies to the eighth, ninth, and tenth assignments of error.

Under the twentieth assignment of error, the only matter excepted to was the ruling excluding an answer to the following question put to the defendant's witness Smith:

"*Q.* Did you furnish to Charles Dunlap for use on 'Louie' a bridle that would be loose on Louie's head?"

This witness had already testified that he could not remember the bridle that "Louie" wore on the day of the injury. It was therefore immaterial whether or not he had furnished for use a bridle, whether loose

Digitized by Google

or not. No other ruling was made that was excepted to in that connection, and we find no error here.

The twenty-first assignment of error is to the effect that the court erred in refusing to charge the jury as requested in defendant's seventh and eighth requests to charge. A reference to page 80 of the record will show that the substance of these requests was given, and in almost the exact language of the requests.

By the twenty-second assignment of error it is claimed that the court erred in charging the jury as follows:

"Negligence, like any other fact, may be inferred from the circumstances of a case. And so from the case and testimony which has been offered you are at liberty to draw the inference of negligence, and if you should find from—you are at liberty to draw inference of negligence from all the circumstances, if you should find that they warrant such inference. But, after all, the whole question of inference that is to be drawn is a question for you and not a question for me."

There is evidently a typographical error in the above quotation. However, in substance the charge was correct, and has been approved by us many times. *Alpern* v. *Churchill,* 53 Mich. 607-613 (19 N. W. 549); *Barnowsky* v. *Helson,* 89 Mich. 523-527 (50 N. W. 989, 15 L. R. A. 33); *Schoepper* v. *Chemical Co.,* 113 Mich. 582-589 (71 N. W. 1081); *La Fernier* v. *Lighter & Wrecking Co.,* 129 Mich. 596, 606 (89 N. W. 353); *Maki* v. *Copper Co.,* 180 Mich. 624 (147 N. W. 533).

We have laboriously examined this record, and finding no reversible error therein, the judgment of the circuit court is affirmed.

BROOKE, C. J., and KUHN, OSTRANDER, BIRD, and STEERE, JJ., concurred. MOORE, J., did not sit.

The late Justice MCALVAY took no part in this decision.

Digitized by Google

MORGAN *v.* ZANGER.

BROKERS—COMMISSIONS.

In an action by a broker to recover a commission agreed to be paid to him for procuring a tenant of real property, where there is no evidence that the proposed tenant was ready, willing, and able to carry out the terms of his offer, plaintiff is not entitled to recover.

Error to Wayne; Van Zile, J. Submitted June 22, 1915. (Docket No. 90.) Decided September 28, 1915.

Assumpsit by Charles L. Morgan against G. W. Zanger for commissions for procuring a tenant. Judgment for defendant on a directed verdict. Plaintiff brings error. Affirmed.

George W. Trendle, for appellant.

Lucking, Helfman, Lucking & Hanlon, for appellee.

STONE, J. This is an action in assumpsit to recover a commission of $5,000, for alleged services in obtaining a tenant for certain premises in the city of Detroit. The declaration alleges:

That on or about October 26, 1911, the defendant made an agreement with the plaintiff to pay the latter said sum of money as a commission for certain services to be rendered in procuring a tenant for certain described property; said agreement being in substance as follows:

"That if this plaintiff would secure a written offer from certain persons, to wit, one J. M. Ward, of the city of Detroit, Wayne county, Michigan, for a 30-year lease of the above-described premises, at a net annual rental to this defendant of $18,000 for each year of said term, lessee to pay all taxes and insurance, said

Digitized by Google

lessee to further agree, in said offer, to deposit, as security for said rentals, either a $30,000 cash deposit, said deposit to draw interest from this defendant at the rate of 6 per cent. per annum (the same to be payable in installments during the erection of a theater building, to be by this defendant erected on said above described premises at a cost not to exceed $100,000, the same to be erected for the use of said tenant or tenants as a consideration for said rentals), or said offer to contain the indorsement of two first-class business men of the said city of Detroit, then the said defendant would pay this plaintiff the said sum aforesaid."

That the said defendant then and there promised to pay the plaintiff, upon receipt of such written offer as aforesaid, the sum of $5,000. That although the plaintiff, on, to wit, November 14, 1911, performed said work and procured and tendered to said defendant such written offer, as agreed, and fully performed and carried out all the agreements by him to be performed and carried out, yet the said defendant refused, and still refuses, to pay the said sum so promised, although demand has been made on him, etc. Then followed the common counts.

The plea was the general issue.

Upon the trial it was the claim of the plaintiff that, at the request of the defendant, he (the plaintiff) obtained in writing from said Ward the following offer, which was delivered to the defendant, to wit:

"With reference to the lease of your property on Broadway and your erecting a theater for us with a seating capacity of 1,500, to cost not to exceed $100,000: We will pay you $18,000 per year rental of same, and pay all taxes, insurance, etc., on a 30-year lease. As a guarantee of good faith on our part and security for rent, we will put up either a $30,000 cash deposit, payable in installments during the erection of the building, or the indorsement of two first-class business men of this city; $30,000 cash deposit to bear 6 per

Digitized by Google

cent. interest. Trusting we can close this matter in the near future, I remain

"Yours very truly,

"J. M. WARD."

It was the further claim of the plaintiff upon the trial that after further negotiations it finally developed that the defendant only had a 13-year lease of a part of the property, that one Waldo A. Avery was the owner, and that he (Avery) would not sanction the arrangement, and consequently the deal fell through. The plaintiff further claimed that Ward stood ready, willing, and able to carry out his written offer, and that it was not by reason of any default on Ward's part that the deal was not consummated.

The defendant claimed that he told plaintiff, and the latter fully understood, that Mr. Avery owned the premises, and that all negotiations must be submitted to, and be subject to the approval of, Mr. Avery. While the plaintiff attempted to deny this, yet on cross-examination he testified that defendant mentioned Mr. Avery as being the owner of the property, and interested in the matter, and that he was to furnish the money.

The plaintiff claimed that he was entitled to his commission of $5,000, he having brought the parties together at the request of the defendant, and having obtained the written offer which was accepted by the defendant under the promise to pay such commission; that it made no difference to the plaintiff what the attitude of Mr. Avery was, inasmuch as his agreement was with defendant alone.

There was evidence tending to support the respective claims of the parties, and much conflict in their claims. At the conclusion of the testimony the trial court directed a verdict and judgment for the defendant, upon the ground that, taking the most favorable view of the evidence, the plaintiff had notice that Mr. Avery was

Digitized by Google

the owner of the premises, and had an interest in the very matter of the contract, and that the whole matter of the offer was tentative, and dependent upon the approval of Mr. Avery, who was to furnish the money for the erection of the proposed building.

The plaintiff has brought the case here for review, and, while there are a number of assignments of error, the plaintiff says there is but one question raised, and that is: Did the trial court err in directing a verdict for the defendant, and in refusing to submit the case to the jury upon plaintiff's requests to charge? The position of the plaintiff is fairly disclosed in the following objection to the introduction of evidence offered by defendant to show the ownership of the property:

"*Plaintiff's Counsel:* I want to enter an objection to the admission of this testimony in regard to the ownership; that the ownership has no bearing whatever on this case, for the reason that all we must prove is that we produced a client, or purchaser, willing and able, and that the ownership of the property was a personal matter between Mr. Zanger and his client; and that the ownership has nothing to do with this contract."

The plaintiff's second request to charge was as follows:

"I charge you that if you find that the party obtained by plaintiff was ready, willing, and able to carry out the terms of the agreement introduced, and was prevented from so doing by the acts of the defendant, then I charge you to bring a verdict for plaintiff for $5,000 and costs."

The position of the plaintiff is fairly disclosed by the following question and answer in his cross-examination:

"*Q.* You brought this paper, and considered that you earned $5,000?

"*A.* I certainly did; yes, sir."

Here he claims the right to recover on a consummated contract.

Digitized by Google

Defendant's propositions are:

(1) Plaintiff is not entitled to recover, because he knew that Mr. Avery was "the owner of the property * * * interested in it * * * financially, to put up the building," and that the payment of commission to plaintiff was conditional upon the final acceptance of the offer by Mr. Avery.

(2) The maker of the offer, J. M. Ward, was never able to carry out his offer and to provide a $30,000 cash deposit," or "the indorsement of two first-class business men."

(3) The offer of J. M. Ward was not certain and complete, and the offer and acceptance thereof would not have constituted an enforceable contract.

Passing the first proposition and considering the second, we are of opinion that the man Ward, by his own undisputed testimony, was not able or ready to carry out his offer. He had at most but $5,000, and his testimony was very vague and unsatisfactory as to his having that amount. The whole matter of carrying out the terms of the offer was "in the air," so to speak.

It is conceded that the two "first-class business men" whose indorsement was offered were Harry E. Beecher and Charles J. Holton. The record shows that it was undisputed that they never authorized Ward or anybody to agree that they would either indorse or guarantee any lease or agreement whatever, or agreed to put any money into the proposition. They had made no binding agreement whatever.

The plaintiff seems to be of the opinion that his right to the commission was established when he brought a paper offer, and that it was not necessary to show that Ward was able and ready to carry out the terms of his offer. We do not so understand the law. In fact, by the statement of counsel in his objection to testimony, and in his request to charge, which we have copied above, it is conceded that, to

Digitized by Google

entitle plaintiff to recover, he must show that he produced a party "ready, willing, and able to carry out the terms of the agreement introduced." His failure to show this constituted an insuperable objection to his recovery. In *Evans* v. *Russell,* 180 Mich. 534 (147 N. W. 489), it was held that, where a plaintiff produced a purchaser able and willing to purchase and pay the price, he was entitled to recover. Nothing less would entitle him to recover. See, also, *Blakeslee* v. *Peabody,* 180 Mich. 408 (147 N. W. 570). None of the authorities cited by plaintiff's counsel would justify a recovery, in the absence of this evidence. For the reason above stated, we are of opinion that the trial court reached the correct conclusion, and did not err in directing a verdict for the defendant.

We also think that there was merit in defendant's third proposition; but we shall not discuss it, for the reason that what we have already said disposes of the case.

The judgment of the court below is affirmed.

BROOKE, C. J., and KUHN, OSTRANDER, BIRD, MOORE, and STEERE, JJ., concurred.

The late Justice MCALVAY took no part in this decision.

Digitized by Google

AHO *v.* CLEVELAND CLIFFS IRON CO.

MASTER AND SERVANT—NEGLIGENCE—FELLOW SERVANT—DELEGABLE DUTY—INSTRUCTIONS.

In an action for personal injuries caused by a fall of rock on plaintiff in defendant's mine, while plaintiff and another miner were engaged in timbering a passageway, the duty to warn plaintiff of the danger being a delegable one, which duty defendant fully performed when it selected a competent fellow-workman, it was not liable for the fellow servant's negligence, and the court was in error in refusing to charge, as requested by defendant, that plaintiff's co-worker was a fellow servant, and that defendant would not be responsible for his negligence, and instead charged that if the defendant knew of the dangerous condition there, either because of the experience of said co-worker and another in working there before plaintiff came, or had learned it in any other way, or could have learned it by the exercise of reasonable care, and if plaintiff was unaware of the dangerous condition, if it existed, then as the undisputed evidence showed that the shift boss did not warn, it was the duty of the co-worker to do so, and if he failed his failure was the failure of defendant and the verdict should be for plaintiff; the court practically directed a verdict for plaintiff.

Error to Marquette; O'Brien, J., presiding. Submitted June 24, 1915. (Docket No. 28.) Decided September 28, 1915.

Case by John Aho against the Cleveland Cliffs Iron Company for personal injuries. Judgment for plaintiff. Defendant brings error. Reversed.

William P. Belden, for appellant.

Le Gendre & Driscoll, for appellee.

Digitized by Google

STONE, J. Action on the case to recover damages for injuries sustained by the plaintiff in the Princeton mine, by falling rock, on June 23, 1910, while in the employ of the defendant. This mine had two shafts, known respectively as Nos. 1 and 2. At the time of the accident the defendant was extending a permanent passageway on the bottom level from No. 1 shaft southerly in the direction of No. 2 shaft, and which would ultimately be connected with that shaft. This passageway was mostly through solid rock. It was what is called a rock drift. It was about 7 feet high, and 7 feet wide. One track was constructed therein for tram cars. This drift was known as No. 5 contract, and at the time of the accident had been extended a distance of about 1,300 feet from No. 1 shaft. It had been deemed unnecessary to timber this drift through its main portion. However, a few days prior to the injury complained of a change of ground was encountered, showing that the drift was entering softer ground, which made it necessary to timber the drift for safety. It should be said that there was a conflict in the evidence at the trial as to the character and condition of the rock in the drift at and near the place where the injury occurred. The miners began the installation of these timber sets 25 or 30 feet from the end of the drift, so as to anchor them in solid ground. The timbers used for this purpose were brought down in the skip at the shaft, and were taken to the working place at the end of the drift. The posts were 8 feet high, with an 8-foot cap on top of them, and lagging was placed over the caps, as is usual in timbering iron mines. Miners usually work in pairs. If one man is sick or does not report for work, it is usual to call a man from some other part of the mine to take his place.

Prior to the day of the injury Walter Helston and Andrew Soderman were working in this shaft. At times three men had worked there; the third man being

Digitized by Google

one John Koski. On the morning of June 23, 1910, there were two sets of timber in place, so that the drift had been timbered for a distance of 16 feet. On that morning Helston was the only member of this gang who reported for work. Upon informing his shift boss that his partner had not come, the shift boss requested the shift boss at No. 2 shaft to furnish a man to fill the vacancy, and the plaintiff was sent over. The plaintiff was at that time 36 years old. He was an experienced miner, having worked in iron mines over ten years before this injury, and had worked in the Princeton mine and that vicinity nearly nine years. He had worked about five years in No. 2 shaft, and altogether about a month in No. 1 shaft, but had not worked in this contract. Helston was a miner of eight years' experience who had worked in No. 5 contract about two months before plaintiff was hurt.

The plaintiff found Helston at the bottom of shaft No. 1, and, without waiting to see their shift boss, they immediately went to work taking timbers from the skip out to their working place at the end of No. 5 contract. They walked through the timber sets which had been completed, and began work near the breast of the drift. Plaintiff testified that he understood that the fact that they were putting in timber sets indicated that the rock was not as sound or good at that point, and that the men were afraid it might cave; that he understood the purpose of putting up the timber sets was to prevent the roof of the drift from caving in on the men, and he also understood that he and Helston were to continue putting up those timbers.

There was a conflict in the testimony as to whether or not there were slips or seams in the rock at this point. There was evidence that the usual and customary method by which miners protect themselves against falling rock, from any cause whatever, is to sound the back or roof of the drift with iron bars or picks, before

Digitized by Google

beginning work in any place. The plaintiff testified that he knew about seams in rock and how to guard against them. On entering the working place that morning they began at once to bar down the loose rock. Helston did the actual barring, and the plaintiff held one end of the plank on which he stood, the plaintiff being under the lagging. They continued this work for at least half an hour, in the course of which Helston barred down two or three large chunks and quite a number of small ones. Plaintiff watched Helston's work. On cross-examination he testified:

"*Q.* Did you see in the back of the drift this chunk which afterwards fell on you; * * * did you see it before?

"*A.* I couldn't see no fault in that back after Helston cleaned it, or trimmed it off.

"*Q.* Did you look at it?

"*A.* Yes, I watched it right along when Helston did trimming of the back.

"*Q.* Helston said that he struck with his bar and his pick the chunk which afterwards fell on you. Did you see him do that?

"*A.* Yes; he did pick some loose right from there, and sounded the place, and it seems to be all right."

Helston testified that he barred and picked the back in the customary way, including the place from which the rock later fell, and that it looked sound to him when he got through with this work, and that he knew there were seams in the back, but he did not tell plaintiff about them. He was not sure whether he told plaintiff on the completion of this work that the place was all right, but it seemed "to be good, after I was through with the back." Soon after the completion of this work, plaintiff took a sledge and began breaking chunks of rock in the dirt pile. In doing so he stepped out from under the lagging, and stood directly under the exposed roof or back of the drift. About an hour after they entered the drift, and in the neighborhood

Digitized by Google

of 15 minutes after Helston ceased trying the rock, a large chunk of rock fell from directly above the plaintiff and severely injured him, breaking both his legs, and inflicting other serious injuries. There was a conflict in the evidence as to how far the place of injury was from the breast of the drift. The plaintiff, in part, testified as follows:

"*Q.* State whether or not you were given any warning of any kind by anybody before you were hurt that day.

"*A.* Nothing at all.

"*Q.* Did you know that there were any slips in the hanging there at the place you were hurt—slips or seams?

"*A.* I didn't know anything about it. I was holding the stage at the time, and Walter was sounding and picking the back there, and I saw he got some loose off there, and the way it seemed to me it was good.

"*Q.* As far as you could see and tell from the sounding he did, it was all right?

"*A.* Yes; it was solid. First he used a bar and took down those big ones, and after that he went over it with his pick and took down the small ones, and sound it, and then we took the staging off. * * *

"*Q.* And did you go in past the place where you were hurt at any time, or did you stay outside of that at all times?

"*A.* I didn't have any time to pass anywhere. Right after we took the staging away, I began to break those rocks. It was about an hour from the time I got into that place until I got hurt. I didn't see in the drift any further than the light of my candle would throw from the place where I was standing when hurt; that was all I saw.

"*Q.* If you knew that there were slips up in the back of that place, or that it was dangerous to work in there, what would you do?

"*A.* I would not go there. I would try to fix it some way that it would not hurt me."

On his cross-examination the following occurred:

"*Q.* John, what is the principal risk which a miner takes in doing work of this character?

Digitized by Google

"A. Back is the worst place, if you don't take good care of your back.

"Q. What happens to you if you don't take good care of the back?

"A. You get hurt.

"Q. You mean by chunks of ore or rock falling down?

"A. Yes, sir.

"Q. What effect, if any, does it have if the back is damp or wet?

"A. It is a good deal more dangerous, and it's bound to loosen, even the solid place of the back.

"Q. What effect does it have, if any, in rock if you can see cracks or seams?

"A. It's a good deal softer, or easier to fall in some kind of rock.

"Q. When you find these cracks and seams, when driving a rock drift, what's the proper thing to do?

"A. You have to examine it, see if they are dangerous or liable to fall, and if you see any such, then you must use those piling posts—forepoles.

"Q. Now John, how did you learn that?

"A. I saw the older miners had that practice, and through my own experience I saw that it was necessary to do so.

"Q. On this morning in question did you and Walter talk about using piling?

"A. We didn't have any time to talk anything about that that morning. * * *

"Q. John, was there room to stick the piling over the top of this cap at this place?

"A. Yes; there was plenty of room.

"Q. Did you think it was necessary to have piling at that place?

"A. It would be necessary all right to have pilings in back of that place where we was.

"Q. John, you used piling in other parts of the Princeton mine, haven't you?

"A. Yes, sir; I guess there is some yet what I been putting up. * * *

"Q. Now, when you went to this place that morning, did you think it needed piling over this cap as a protection, before setting up that new timber set?

Digitized by Google

"*A.* I didn't know that that place was such, because I didn't have any time to examine the place, and I didn't know the place, and I wasn't even on the dirt pile over there."

Helston testified that there were no poles or piling suitable for forepoles in the drift, but it was undisputed that the defendant kept on hand on the surface a supply of all kinds of timber used in the mine, including piling. It was undisputed that the work in which these men were engaged was purely construction work, and that this drift was being tunneled through the rock to furnish a passageway from one shaft to the other. It also appeared without dispute that the very purpose of putting in these timber sets was to protect the men from injury from falling pieces of rock, and that plaintiff and Helston, two experienced miners, were employed to do this work. The defendant had a superintendent in charge of the Princeton mine and other mines operated by defendant in that district. It also employed a mining captain, who had charge, under the superintendent, of this mine. In addition, the defendant employed a shift boss at each of these shifts. About 25 men were employed at No. 1 shaft at the time.

At the conclusion of the testimony the defendant moved the court to direct a verdict in its favor, on the grounds that the plaintiff had failed to prove any negligence of defendant; that the risk, if there was any risk, was the usual risk incident to mining operations, which the plaintiff assumed by the employment; that his own carelessness and negligence contributed to the injury; and also that the carelessness and negligence of Helston, plaintiff's fellow servant, contributed to the injury. The motion was overruled, and the defendant duly excepted. The case was then submitted to the jury, and they returned a verdict for the plaintiff.

Digitized by Google

There was a motion for a new trial, involving the questions above referred to, and also the proposition that the verdict was contrary to the overwhelming weight of the evidence. The motion was overruled, and exception duly taken.

The defendant has brought the case here for review, and the following claims are made by appropriate assignments of error:

(1) That upon the undisputed facts plaintiff failed to prove or establish any negligence of defendant.
(2) That if any warning was necessary this duty was delegable.
(3) That the court erred in its charge as indicated.
(4) That defendant's motion for a new trial should have been granted.

There is no claim here on the part of the plaintiff that the doctrine of "safe place," as that term is usually expressed, applies here. In fact, the court charged the jury upon that subject as follows:

"Under the circumstances of this case, the defendant did not owe the duty to the plaintiff to furnish him a reasonably safe place in which to work. The so-called 'safe place' doctrine has no application to this place. The plaintiff and Walter Helston were engaged at the time of the accident in timbering this drift for the purpose of making it safe for use as a passageway."

The defendant's sixth request to charge was as follows:

"Plaintiff's partner, Walter Helston, must be regarded as the fellow workman of the plaintiff, and if he was negligent in any respect, either in failing to tell the plaintiff about the risks to be incurred at this working place, or in the manner in which he was performing his duties on the morning in question, then I charge you that the plaintiff cannot assert such negligence as a ground of recovery against the defendant, because it would not be responsible for such negligent acts of Walter Helston."

Digitized by Google

This request was refused. Upon that subject the court charged the jury as follows:

"It appears from some of the evidence in the case, and I think from all of the evidence, * * * previous to the time when this piece of ground fell upon the plaintiff, Helston had inspected the ground by barring it, and pinching down whatever loose ground he could find in the back, and that it was determined that it was safe. Now, gentlemen of the jury, if the situation there was such, if the nature and character of that ground was such that after an inspection of the kind made by Helston the ground would appear to have been safe, but was not, in fact, really safe, and if you find from the evidence in the case that the treacherous character of the ground, if you find that it was treacherous, was known to the defendant, either because of the experience that Helston and his partner had in working in there before the plaintiff came to that place, or had learned it in any other way, or could have learned it by the exercise of reasonable and ordinary care and skill in carrying on the business of mining in that drift, and you further find from the evidence that the plaintiff was unaware of that condition of the ground, if it so existed, then, gentlemen of the jury, I charge you that, as the undisputed evidence shows that the shift boss did not warn in regard to the nature and character of that ground, it was the duty of Helston to have done it, and if he failed to do it, if he failed to warn the plaintiff, his failure is the failure of the company, and your verdict in that event should be for the plaintiff, providing you have found that a man of reasonable care and observation working in that drift the same length of time the plaintiff was working there, and under the same conditions would not have known and appreciated the danger of that ground falling, under the circumstances and conditions under which it did fall."

We think this was reversible error. By the refusal to give defendant's sixth request, and by the portion of the charge just quoted, the trial court practically directed a verdict for the plaintiff. Not only was the

Digitized by Google

question of Helston's negligence submitted to the jury, but they were instructed that, as matter of law, the failure of Helston to give this warning constituted the failure of the defendant, for which it would be liable. Under our repeated decisions we think that it must be held that Helston was the fellow servant of the plaintiff. The duty to warn in work of this character is a delegable duty, which is fully performed when the employer selects a suitable and competent fellow workman, and makes it his duty to give the warning. Helston did not stand in the relation of foreman or shift boss to plaintiff. As was held in *Avikainen* v. *Mining Co.*, 160 Mich. 375 (125 N. W. 545, 136 Am. St. Rep. 443), Helston was simply a fellow miner of the plaintiff, and did not by reason of his seniority in the work at that place represent the defendant, so as to make it liable for his negligence, if any. *Amoe* v. *Engineering Works*, 151 Mich. 212 (114 N. W. 1010); *Kaaro* v. *Mining Co.*, 178 Mich. 661 (146 N. W. 149); *Mikolojczak* v. *Chemical Co.*, 129 Mich. 80 (88 N. W. 75); *Mesich* v. *Mining Co.*, 184 Mich. 363 (151 N. W. 564); *Lahti* v. *Mining Co.*, 186 Mich. 18 (152 N. W. 907); *Juntunen* v. *Mining Co.*, 184 Mich. 341 (151 N. W. 571); *Koskell* v. *Mining Co.*, 182 Mich. 586 (148 N. W. 699); *Andrews* v. *Mining Co.*, 180 Mich. 72 (146 N. W. 394).

Counsel for plaintiff has called our attention to *Panela* v. *Mining Co.*, 177 Mich. 669 (144 N. W. 528). It should be remembered that in that case the plaintiff was engaged in work of a character which we held entitled him to the protection of the safe place doctrine.

Without holding that there was no evidence of any negligence of defendant which might have warranted the submission of that question to the jury, under proper instructions, we are of opinion that there was prejudicial error in the charge as given, and for the

Digitized by Google

reasons pointed out, the judgment of the circuit court is reversed, and a new trial granted.

BROOKE, C. J., and KUHN, OSTRANDER, BIRD, MOORE, and STEERE, JJ., concurred.

The late Justice MCALVAY took no part in this decision.

FIRST STATE BANK OF DECATUR *v.* DAY.

O'DELL *v.* FIRST STATE BANK OF DECATUR.

1. TENDER—FORECLOSURE OF MORTGAGES—AMOUNT.

An injunction against foreclosing a mortgage held by the mortgagee, a savings bank, was properly refused in a suit brought to restrain it from foreclosure by advertisement, and a decree was correctly granted in favor of the mortgagee in proceedings brought to foreclose the instrument by the holder, to whom the defendants had tendered a sum insufficient to pay the principal and interest, all of which the bank had declared to be due and payable for defendant's default under the terms of the security; the two causes being consolidated and heard as one.

2. SAME—BILLS AND NOTES.

Where the tender was made as indicated by the parties to pay all that was due under such mortgages and defendant's indebtedness included a note for interest that he had allowed to accrue, and which remained unpaid, the tender should have included the sum due for such interest, although the bank had indorsed upon the mortgage notes, as paid, the sum represented by the note.

3. SAME—INTEREST—MORTGAGES.

The objection that the bill of complaint did not rely upon any claim that the principal had become due, was un-

Digitized by Google

tenable where the complainant had elected to declare the entire debt due and payable; the mortgagee was entitled to declare the principal due, if it had been in arrears for a sufficient length of time, the mortgage so providing by express language, and if the tender was not large enough to satisfy the sum due.

4. SAME—ESTOPPEL.
No estoppel could be said to have arisen from a letter of the holder of the mortgage to the second mortgagee, one of the joint defendants, containing the advice or suggestion that the second mortgagee pay the prior lien, neither party having changed his situation because of the position taken in the letter by the senior incumbrancer.

5. MORTGAGES—NOTICE OF FORECLOSURE.
In a notice of foreclosure, the date rather than the day stated controls, and in the case of error in naming Friday for Saturday, the ninth, of the month, the notice was not void therefor.

6. APPEAL AND ERROR—CONTEMPT—FORECLOSURE.
The court on appeal will not review contempt proceedings for violation of an injunction of the lower court, upon a record which does not disclose what, if any, adjudication was made.

7. MORTGAGES—FORECLOSURE—DECREE—SOLICITOR'S FEE.
Without some basis in the facts or evidence, the trial court exceeded its authority in providing for a solicitor's fee of $100, by way of punishment for contempt in violating a restraining order of the court; nor was there ground for stopping interest on the amount bid at mortgage sale on foreclosure by advertisement.

Appeal from Van Buren; Des Voignes, J. Submitted June 25, 1915. (Docket No. 52.) Decided September 28, 1915.

Bill by the First State Bank of Decatur against James Ingersoll Day and Benjamin F. J. O'Dell for the foreclosure of certain mortgages; also injunction bill by said O'Dell and Day against the First State Bank of Decatur to restrain foreclosure by advertisement of a third mortgage. The causes were consoli-

Digitized by Google

dated. From a decree for complainant bank, said O'Dell and Day appeal. Modified and affirmed.

Glenn E. Warner, for appellants O'Dell and Day.

David Anderson, for appellee bank.

STONE, J. These cases were consolidated and heard as one case in the circuit, and by stipulation of counsel they are here presented in the same manner. The questions at issue may be summarized as follows:

James Ingersoll Day, upon different dates, gave to the First State Bank of Decatur, Mich., his three several promissory notes, secured by three separate mortgages upon certain real estate. The first note bears date July 29, 1909, was for the sum of $1,300, due five years after date, with interest at the rate of 7 per cent., payable semi-annually, and was secured by mortgage on that part of the E. ½ of the N. E. ¼ of section 25, township 4 S., range 15 W., lying north of the Michigan Central Railroad, and containing 35 acres, more or less. The second note bears date January 4, 1910, was for the sum of $2,600, payable as follows: $500 on January 4, 1912; $500 on January 4, 1913; and $1,600 on January 4, 1915—with interest at 7 per cent. per annum, payable semi-annually, and was secured by mortgage on the north 50 acres of the W. ½ of the N. E. ¼ of said section 25. The above-described two notes and mortgages are the ones embraced in the chancery foreclosure suit by the bank. The third note bears date April 1, 1911, was for $2,500, payable as follows: $500, April 1, 1913; and $2,000, April 1, 1914—with interest at the rate of 7 per cent. per annum, payable semi-annually, secured by mortgage upon both of the above-described parcels of land.

On June 5, 1912, the interest on these three notes was past due, in the sum of $316.45, and Mr. Day gave his promissory note for this interest, payable January

Digitized by Google

1, 1913, with interest at 7 per cent. per annum. The amount of this note was distributed and indorsed on the three notes, said indorsements showing the interest on each of them to be paid up to the last due date preceding said June 5, 1912. It will be noted that on the first note none of the principal would be due, according to its terms, until July 29, 1914. On the second note an installment of principal of $500 came due January 4, 1912, but this installment was extended to January 4, 1914, by a letter written by the cashier of the bank to Mr. Day on June 6, 1912. Another installment of principal of $500, however, became due January 4, 1913. On the third note an installment of principal of $500 became due April 1, 1913. This is the note which is involved in the injunction suit brought against the bank. The record shows that on June 7, 1912, Mr. Day had given a fourth mortgage to Benjamin F. J. O'Dell, of Chicago, to secure the payment of $8,000, which mortgage covered the entire property above described.

In April, 1913, E. B. Copley, president of said bank, wrote two letters to Mr. O'Dell relating to the mortgages held by the bank. They were as follows:

"THE FIRST STATE BANK.
"DECATUR, MICH., April 12, 1913.

"Benj. F. J. O'Dell,
"Chicago, Ill.

"*Dear Sir:*—

"As I understand, you hold a second mortgage against Jas. I. Day. It is possible you might be interested in keeping up the interest on the first mortgages which we hold in this bank. The directors held a meeting yesterday and had a resolution to foreclose these Day mortgages, along with some other mortgages, which we hold, unless the interest was paid that is due, about some $783, or thereabouts. This will be done very soon unless *all* this interest is paid in full. The bank examiner also noticed this past-due paper when he was here, and we cannot carry this

Digitized by Google

kind of paper as a bank asset any longer, so, if you are interested, kindly let me hear from you immediately. Yours respectfully,

"FIRST STATE BANK, DECATUR, MICH.,
"Per E. B. COPLEY."

"FIRST STATE BANK.
"DECATUR, MICH., April 21, 1913.

"Benj. F. J. O'Dell,
"Chicago, Ill.

"*Dear Sir:*—

"I had a talk with our attorney for the bank a few days ago, and he said in regard to foreclosing the Day mortgages that he would want to notice them for trial by the 28th or 30th day of April, at the latest, so I thought I would let you know, so if you wished to pay the interest up, as we talked, in full, you could do so. Now, I do not want you to think I am urging this interest payment, for it is up to you to do as you choose, for we have no claim upon you; but it is only a matter of courtesy for us to give you the chance, if you do, so you had better come to Decatur, for I can give you several hints in regard to the property that will be of use to you in the future, and of more value than any cost of ticket or time.

"Yours respectfully,
"E. B. COPLEY."

Between the dates of these letters Mr. O'Dell came to Decatur and saw Mr. Copley. The latter claimed that, as interest due and secured by the bank mortgages, there should be included the note of $316.45. To this claim Mr. O'Dell objected. Finally, on April 23, 1913, Mr. O'Dell and Mr. Day came to Decatur, having in their possession $1,000 in gold which belonged to Mr. Day, and which they claim they tendered to Mr. Hill, the cashier of the bank, in full for all interest due, and $500 of the principal. This was refused; the bank claiming that there was then due $783 of interest and two installments of principal of $500 each. In all the conversations between these parties the three mortgages were considered together, and there was no claim that there was any

Digitized by Google

separating of one mortgage from another, or one note from another, or any attempt to tender the amount of one particular note or mortgage. There is no claim that there was any specification that the tender should apply to one mortgage more than to another, except as more might be due on one note than on another.

The bill to foreclose the first two mortgages was filed on May 2, 1913. In both of the said mortgages was the following provision:

"It is agreed that, if the interest above stipulated to be paid shall remain unpaid for the space of 60 days after the same shall fall due, the whole amount of principal remaining unpaid, as well as said interest, shall thereupon become due and payable forthwith, notwithstanding the time first above limited for the payment of said principal shall not then have expired."

The foreclosure bill contained an allegation that, by the terms of said mortgages above set forth, complainant had elected, and did elect, to take advantage of said stipulations, and did declare all sums secured by said mortgages due, both principal and interest. The defendants answered, denying that the amount claimed was due, and claiming that by said tender complainant was estopped and precluded from foreclosure, and that nothing was due upon said mortgages. Early in May, 1913, the bank commenced proceedings to foreclose by advertisement its mortgage of April 1, 1911, being its third mortgage on said property.

On August 4, 1913, the said Day and O'Dell filed their bill of complaint against the bank to restrain the foreclosure by advertisement. The bill set forth the mortgage to O'Dell, the tender made, and claimed that there was nothing due upon said bank mortgage of April 1, 1911. A temporary injunction restraining the sale was granted by the circuit judge. Later a motion was made to dissolve the injunction. The motion was argued and granted—

Digitized by Google

"provided that the complainants in the injunction suit did not file a bond to be approved by the register, conditioned to save the defendants harmless, etc., on or before August 29, 1913, and a bond was filed before August 29, 1913. September 11, 1913, the complainants made a motion to withdraw the bond they filed August 29th, and file another bond. It was noticed for argument September 17, 1913. In the meantime the sale that was advertised to take place August 9th, on account of the temporary injunction, was adjourned until Saturday, August 30th, and on said day adjourned until September 12th, at which time a sale was made."

So reads the record. Later contempt proceedings were instituted against the president of the bank and its attorney for having made the sale under the mortgage-sale notice. Interrogatories were filed and answered. The record contains none of the evidence in the contempt proceeding, but it appears that a hearing was had, and an order was entered declaring said foreclosure sale of September 12, 1913, null and void. It appears that later said order was amended and modified. The cases, being at issue, were heard upon testimony taken in open court, and a decree of foreclosure was entered in the suit by the bank to foreclose the first two mortgages. The court also entered a decree in the injunction case, in which it found as matter of fact that said complainants did not tender the amount due on the mortgages and notes mentioned in the bill of complaint, at the time claimed by them, and that the proof did not sustain the allegations of the bill, and that complainants were not entitled to the relief therein prayed, and were not entitled to have the foreclosure proceedings enjoined, and the deed issued set aside and held for naught. By this decree the court dismissed the injunction bill, but decreed that complainants therein might redeem the premises on or before September 14, 1914, by paying the amount due on the date of said sale and for which said premises

Digitized by Google

were bid in, less $100; it being the intention of the decree to allow no costs or interest to the defendant in addition to the amount at which said premises were bid in, and that there should be deducted from such amount, in case of redemption, $100 allowed as solicitor's fees to said complainants. From this part of said decree the bank has appealed, and Day and O'Dell have appealed from both decrees.

As we understand the claims of Day and O'Dell, they are that the decrees should be reversed for the following reasons:

(1) Because of the alleged tender of $1,000.
(2) Because the bill of complaint in the foreclosure case and the notice of sale under the last bank mortgage are both based solely on default in payment of interest.
(3) On a claimed estoppel, based on the letters above set forth.

1. Does the alleged tender afford sufficient grounds for the reversal of the decrees? We think not. We agree with the trial court that the amount tendered was insufficient in amount. It will be noticed that the tender was made as a tender of everything due upon the notes and mortgage, both interest and principal. Manifestly the amount was too small.

2. An examination of the bill of complaint in the foreclosure case, and of the notice of sale, shows that there is no merit in the second point. If the tender was not large enough to cover the amount due, and the interest being in arrears a sufficient length of time, the bank had the right to declare the entire amount due and foreclose therefor. *Johnson* v. *Van Velsor*, 43 Mich. 208 (5 N. W. 265); *Hawes* v. *Insurance Co.*, 109 Mich. 324 (67 N. W. 329, 63 Am. St. Rep. 581).

3. We do not think there is any merit in the claim of estoppel. They did not meet the terms of the letter of Mr. Copley. In his claim of $783 there was included

Digitized by Google

the interest note of $316.45, which was repudiated by O'Dell. He could not repudiate a part of the offer and accept the remainder. The letter in no event could be the basis of an estoppel. O'Dell was already a subsequent mortgagee. The letter did not change his situation or alter his legal rights.

It is further claimed by Day and O'Dell that the notice of sale was defective, in that the notice fixed the day of sale as Friday, August 9th, when it should have been Saturday, August 9th, and the notice was published the full time required by law before the correction was made from Friday to Saturday. It might be a sufficient answer to this claim to say that the injunction bill was not based at all on this claimed defect, but was based entirely on the claim that there was nothing due upon the mortgage. The statute does not require the day of the week to be stated. We think that in the case of such a discrepancy the day of the month is controlling, especially where there is no claim that the party complaining is misled. *Lee* v. *Clary*, 38 Mich. 223, *Reading* v. *Waterman*, 46 Mich. 107 (8 N. W. 691). This court has held that, where the day of the week stated in a writ as the return day does not correspond with the day of the month, the latter will control. *State Savings Bank* v. *Circuit Judge*, 95 Mich. 100 (54 N. W. 632), citing *Ingersoll* v. *Kirby*, Walk. Ch. 27. A trifling mistake in the notice of sale, not of such a nature as to mislead or injure any one, may be corrected in the subsequent publications of the notice, without affecting the validity of the proceedings. 27 Cyc. p. 1474.

We have examined the other points urged by counsel against the validity of the notice, but think that they are without merit. We are of opinion that the decree of foreclosure should be affirmed.

Upon this record we are of the opinion that the contempt proceedings are not before us. It does not dis-

Digitized by Google

tinctly appear that there has been an adjudication of that matter in the court below. For some reason, not stated in the decree in the injunction case, the court stopped the running of interest upon the amount bid at the sale in the advertisement foreclosure, and awarded to complainants $100 solicitor's fee. Whether or not this was intended to be by way of punishment for contempt of court we are unable to say. There seems to be no basis stated for such order. We find no evidence to warrant the stopping of interest, or the granting of $100 solicitor's fee, and both of these matters should be eliminated from the decree dismissing the injunction bill.

In all other respects that decree will be affirmed. The bank will recover the costs of this court against Day and O'Dell.

BROOKE, C. J., and KUHN, OSTRANDER, BIRD, MOORE, and STEERE, JJ., concurred.

The late Justice MCALVAY took no part in this decision.

MISHAWAKA WOOLEN MANUFACTURING CO. *v.* STANTON.

1. SALES—FRAUDULENT CONVEYANCES—RESERVATION OF TITLE.
   A contract of sale containing a clause that "title to, property in, and right of possession to said goods, and to all other goods ordered by said second party of said first party within one year from the date hereof, shall be and remain in said first party until sold, and that upon sale thereof, the proceeds received therefor, whether notes, accounts or moneys, shall be and remain the property" of the seller

Digitized by Google

until the goods were paid for in cash, was not void as to creditors of the vendee, or as to his trustee in insolvency, upon grounds of public policy.

2. SAME—VALIDITY OF CONTRACT—FRAUD.

An order for goods containing a reservation of title to the merchandise sold by a clause in fine print at the bottom of the agreement, which the purchaser signed, was not invalid because his attention had not been called to the clause by the agent who took the order, where no artifices or deception was used to secure his signature, and such provision was printed in the same type as the rest of the contract in the body of the order above the buyer's signature.

Case-made from Kent; Brown, J. Submitted June 29, 1915. (Docket No. 114.) Decided September 28, 1915.

Replevin by the Mishawaka Woolen Manufacturing Company, an Indiana corporation, against Henry T. Stanton, trustee for creditors of Joseph D. Van Sickle, for certain merchandise. Judgment for plaintiff. Defendant brings case-made. Affirmed.

Corwin & Souter and *Abner D. Dilley*, for appellant.

Boltwood & Boltwood (*Buell & Lucas*, of counsel), for appellee.

STONE, J. This case is brought here by defendant, after judgment for plaintiff, upon a case-made, in an action of replevin. The case was tried by the court without a jury. The facts, being stipulated, were adopted by the court, and made a part of the finding. The material facts in the case are as follows:

For some time prior to April 10, 1912, Joseph D. Van Sickle had been engaged in the general merchandise business at Carson City, Mich., and on said date plaintiff's agent called upon said Van Sickle and took an order for goods in the usual way, on blanks furnished by plaintiff, a copy of which order appears in the record. The attention of Van Sickle, who signed

Digitized by Google

the order, was not called to any of the agreements printed on said order blank, and he did not know that the fine print at the bottom of the order blank contained an agreement whereby "the title to, property in, and right of possession of said goods should be and remain in said first party until sold, and that upon sale thereof the proceeds received therefor, whether notes, accounts, or moneys, should be and remain the property of said first party until said goods are fully paid for in cash." Nor was said Van Sickle ever instructed or requested to keep a separate account of sales made from said goods, or of the cash, notes, or accounts received therefor. The goods mentioned in said order were shipped by plaintiff and received by Van Sickle some time in the month of September, 1912, and were billed to him by plaintiff at $640.64. Said Van Sickle had previously purchased merchandise of the same or similar kind and quality from the plaintiff, parts of which remained in his stock at the time the goods in the above-mentioned order were received and placed in stock.

Upon receipt of the goods in question Van Sickle placed the same in his store, together with his stock previously purchased from plaintiff, as well as with other goods comprising his general stock of merchandise. Sales were made by Van Sickle from his general stock of merchandise, including goods received from plaintiff, in the usual course of trade, some goods being sold for cash, others were sold on credit and were charged in personal accounts, on which the customers paid on account from time to time, without reference to any particular item, and some merchandise was paid for by accepting in exchange butter and eggs, which in turn were sold for cash or on credit. No attempt was ever made by Van Sickle to separate the accounts or money received from the sale of goods ordered from plaintiff from money or accounts received from the

Digitized by Google

sale of goods bought of other merchants or manufacturers, and the same was mingled together at all times and used by Van Sickle as a single fund.

On April 12, 1913, said Van Sickle, being financially embarrassed, gave defendant a trustee chattel mortgage upon all his merchandise and fixtures, including the goods ordered from plaintiff, to secure all his creditors alike, including plaintiff. Said Van Sickle, previous to April 12, 1913, had sold $486.06 worth of the goods ordered from the plaintiff on April 10, 1912, having on hand $154.58 worth of said goods. He also had on hand $73.33 worth of similar goods bought from plaintiff previous to April 10, 1912. Van Sickle had paid plaintiff in full for all goods purchased previous to April 10, 1912, but had paid only $100 on the purchase price of the goods ordered April 10, 1912, leaving a balance of $540.64 due plaintiff on the goods so ordered. After accepting the trust under the mortgage and taking possession of the stock, defendant notified the various creditors of Van Sickle of the giving of the mortgage, and requested statements of their accounts in order that he might verify the same and make distribution of the proceeds of the property to be sold under the mortgage. He received a statement from plaintiff showing $555.63, including freight and interest, amounting to $14.99, due it from Van Sickle, and made one payment of 30 per cent. to all creditors, including plaintiff. The plaintiff then caused an investigation to be made, and upon learning that there were certain of said goods on hand, paid back a proportionate amount of the 30 per cent. received, and demanded the goods on hand from the trustee, claiming title under and by virtue of the clause in fine print at the bottom of the order, and, being refused possession by the defendant, acting as trustee under said mortgage, plaintiff brought replevin for said goods. It was agreed that the value of the goods replevied was

Digitized by Google

$154.56, and in case of judgment for defendant, return of the goods was waived, and a judgment in said sum was to be entered; and in case of judgment for plaintiff, then the damages were to be assessed at 6 cents, with costs to be taxed.

Under the heading of "Guarantee," the pertinent clause in said order, which was just above the signature of said Van Sickle, was as follows:

"It is agreed by and between the Mishawaka Woolen Manufacturing Company, party of the first part, and the undersigned orderer of the foregoing goods, party of the second part, that the title to, property in, and right of possession to said goods, and to all other goods ordered by said second party of said first party within one year from the date hereof, shall remain in said first party until sold by said second party, and that upon sale thereof the proceeds received therefor, whether notes, accounts, or moneys, shall be and remain the property of said first party until said goods are fully paid for in cash; that if payment for the same shall not be made when due, or if at any time before the same shall be fully paid for, said second party shall become insolvent, or shall, in the opinion of said first party, be in danger of insolvency, or if said first party shall, for any reason whatever, deem itself in danger of losing the price of said goods, then the said first party may reclaim, and take possession of so much of the said goods as shall remain unsold in the ordinary course of retail business, and may also take possession of any proceeds of sale of any such goods; that said second party shall not sell, ship, or reship, or in any manner directly or indirectly supply any retail or wholesale dealer with any such goods, nor dispose of them in any manner except in the ordinary course of business at retail sale, except with the express consent and approval of said first party previously obtained; that 'punched' goods are ordered subject to said first party's having them in stock; and that it does not guarantee quality or delivery. The party of the first part will not be responsible for delays by reason of strikes, fires, accidents, or other causes beyond its control."

Digitized by Google

Counsel for defendant filed certain requests for special findings of law. The conclusions of law by the trial court were as follows:

"(1) That Joseph D. Van Sickle, having signed the order, Exhibit A, he and his mortgagee are both bound thereby, even though he did not read the agreement in fine print above his signature; and the defendant's fourth and fifth requests are therefore refused.

"(2) That the delivery of all the goods by the plaintiff to Joseph D. Van Sickle under the contract order set out in the agreed statement of facts constituted a valid conditional sale.

"(3) That under the agreed statement of facts said Joseph D. Van Sickle was bound by the terms of the agreement that he entered into with the plaintiff, whether or not he knew the contents of the agreement he signed.

"(4) That the agreement signed by the said Joseph D. Van Sickle and the plaintiff clearly shows that the meaning of the agreement was that the title to the goods sold by the plaintiff to said Joseph D. Van Sickle under the contract was to remain in the plaintiff until the goods were sold by said Joseph D. Van Sickle in the ordinary course of retail trade.

"(5) That the position of the clause retaining title in the plaintiff of the goods unsold and the type in which such clause is printed are sufficient to bind said Joseph D. Van Sickle to the terms of the agreement.

"(6) That the rights of the defendant under the trust mortgage are exactly the same as were the rights of Joseph D. Van Sickle in regard to the goods covered by the conditional sale contract and that were not sold in the ordinary course of retail trade.

"(7) The vital question of law in this case seems to be whether or not an absolute sale is made and title passes to the purchaser, where the property is sold and delivered to the buyer for the purpose of resale. * * * Without comment upon the cases which hold that it is against public policy to validate a contract which seeks to withhold title, and at the same time gives to a vendee the right to make immediate resale in his own name, it is sufficient to say that the Supreme Court of our State has decided adversely to the de-

Digitized by Google

fendant's first, second, and third requests, and those requests are therefore refused.

"(8) I find, under the stipulated facts and the decisions of the Supreme Court of the State of Michigan, that the plaintiff is entitled to judgment in its favor of six cents damages, and costs to be taxed."

Proposed amendments were refused. and exceptions duly taken.

By appropriate assignments of error the following questions are presented by appellant:

(1) Can the vendor of merchandise sold expressly for resale retain title thereto, as against the creditors or subsequent purchasers, or incumbrances from the conditional vendee?

(2) Is the signer, or his legal representative, bound by the terms of a contract contained in fine print, which he did not read, under the circumstances here appearing?

1. In presenting the first question, counsel for appellant concede that personal property may be sold or contracted to a purchaser, to be by him retained and used for his pleasure or business, and that such contracts are valid and binding upon the creditors of, or purchasers from, the conditional vendee, and they call attention to nearly a score of such cases.

They claim, however, that it is equally well settled, by the great weight of authority throughout the United States, that personal property sold or delivered with the express understanding that the same is to be resold is an exception to the general rule applicable to conditional sales, and that such a sale or delivery of property is inconsistent with the continued ownership of the vendor, and is void as to creditors of or subsequent purchasers from said vendee. In support of this proposition counsel cite the dissenting opinion of Justice GRANT in *Excelsior Iron Works* v. *Lee*, 123 Mich. 499 (82 N. W. 207); *Ludden* v. *Hazen*, 31 Barb. (N. Y.) 650; *Mishawaka Woolen Manfg. Co.* v. *Westveer*, 191

Digitized by Google

Fed. 465 (112 C. C. A. 109), and a large number of cases from other States; also *John Deere Plow Co.* v. *Mowry*, 222 Fed. 1.

In reply counsel for plaintiff claim that upon this proposition the courts of this country may be divided into four classes:

(1) Those holding contracts of conditional sale void as against public policy, whether filed or recorded or not. Examples of such courts are those of Kentucky and Tennessee.

(2) Those holding such contracts valid between the parties and those having notice thereof, when they relate to specific articles, such as a horse, piano, etc., but void, as against public policy, when they relate to sales of merchandise intended for resale at retail, and that examples of such courts are those of New York, Indiana, Mississippi, and Texas.

(3) Those holding such contracts valid between the parties and those having notice thereof, no matter whether or not they relate to specific articles or to merchandise intended for resale, but invalid as against innocent purchasers, mortgagees, etc., unless filed or recorded in the proper clerk's office, and that examples of such courts are those of Ohio, Minnesota, North Dakota, and Wisconsin.

(4) Those holding such contracts valid, whether they relate to specific articles or to stocks of merchandise intended for resale, not only between the parties and those having notice thereof, but also as between the conditional vendor and an innocent purchaser or mortgagee of the vendee, or between the vendor and the attachment or judgment creditors of the vendee, or as between the vendor and the assignee in insolvency proceedings or trustee in bankruptcy of the vendee, irrespective of whether or not such contracts are filed or recorded; that examples of such courts are those of Michigan, Massachusetts, Vermont, Connecticut, and Arkansas; and that no court has gone further to sustain contracts of conditional sale than has this court, and that in no case has this court held such contracts void or against public policy, whether they related to the sale of merchandise intended for resale or only to a specific article intended for use by the vendee.

Digitized by Google

In support of this claim plaintiff's counsel cite the following cases: *F. J. Dewes Brewery Co.* v. *Merritt*, 82 Mich. 198 (46 N. W. 379, 9 L. R. A. 270); *Pratt* v. *Burhans*, 84 Mich. 487 (47 N. W. 1064, 22 Am. St. Rep. 703); *American Harrow Co.* v. *Deyo*, 134 Mich. 639 (96 N. W. 1055); *Edwards* v. *Symons*, 65 Mich. 348 (32 N. W. 796); *Hood* v. *Olin*, 68 Mich. 165 (36 N. W. 177); *Bunday* v. *Machine Co.*, 143 Mich. 10 (106 N. W. 397, 5 L. R. A. [N. S.] 475); *Worden Grocer Co.* v. *Blanding*, 161 Mich. 254 (126 N. W. 212, 20 Am. & Eng. Ann. Cas. 1332); *Wasey* v. *Whitcomb*, 167 Mich. 58 (132 N. W. 572); and many of our earlier cases. Many cases are also cited from other States.

We cannot here undertake to analyze all of the cases cited by counsel. We shall not refer to the many cases cited relating to the sale of personal property which has been attached as fixtures to the realty, as we are not dealing with that question. We shall refer to a few only of our own cases.

In *F. J. Dewes Brewery Co.* v. *Merrit, supra*, the plaintiff shipped beer to Lentz Bros. under the following contract:

"BIG RAPIDS, MICH., Dec. 18, 1888.

"It is hereby agreed by and between the F. J. Dewes Brewing Company, of Chicago, Illinois, and Lentz Bros., of the city of Big Rapids, Michigan,

"1. That the F. J. Dewes Brewing Company agree to ship to Lentz Bros., all beer ordered by them at the following price, $5.75 per barrel f. o. b., at Big Rapids, and that the right, title, and interest of said beer is to remain and rest in the F. J. Dewes Brewing Company until sold; and we, the said Lentz Bros., agree to take the said beer, and pay for the same, on above conditions."

Signed by the parties.

The brewing company under the above contract sent to Lentz Bros. two car loads of beer, which were received by them at Big Rapids. After they had sold

Digitized by Google

about one and one-half car loads, the remainder was levied upon by the defendant, as sheriff of Mecosta county, and was taken away by him upon an execution in his hands, issued upon a valid judgment in favor of a creditor of one of the members of the firm of Lentz Bros. The circuit judge instructed the jury that, under the terms of the agreement, the absolute title to the beer passed at once to Lentz Bros. and was subject to levy and sale under the execution, and a judgment in replevin was entered for the defendant. In reviewing that judgment this court said:

"Now, the contract was one which it was competent for the parties to make, unless it was void as being against public policy. The brewery company had a right to say,—

"'We will fill your order for beer, which you may sell as you choose, but the title shall remain in us until you do sell, and then the title will pass to the purchaser, in which case we will trust to your personal responsibility to pay us, at the rate of $5.75 a barrel.'

"The effect of such contract was that the property not sold remained the property of the company, and the firm owed them for all they had sold. * * * This court has gone very far in sustaining conditional sales, and has never declared them void, or different from what the parties have intended by their agreement [citing cases].

"The authorities cited above show the principles upon which this court has proceeded in upholding such contracts, and it is unnecessary to restate them here or to review the decisions of other courts holding a different view."

In *Pratt* v. *Burhans, supra*, plaintiffs entered into a contract with the Owosso Cigar Company by which they agreed to send and deliver to it a quantity of cigars, the title thereto to be retained in plaintiffs until paid for or sold, and, when sold, the accounts to belong to them. The defendant, Burhans, had indorsed for the Owosso Cigar Company. Plaintiffs shipped goods

Digitized by Google

to the cigar company, and shortly after it turned over all its stock, including the cigars shipped by plaintiffs, to the defendant, and gave him a bill of sale thereof, which the latter claimed was a *bona fide* purchase, in consideration of his indorsement. Defendant took possession of the goods. After demand and refusal plaintiffs brought replevin. In this court it was held that the sole issue for the jury was whether plaintiffs and the Owosso Cigar Company made a contract by which the title of the goods was to remain in the plaintiffs until they were paid for or sold in due course of trade. Justice GRANT said:

"The defendant did not buy them in the due course of trade; and therefore, if such a contract was made, the plaintiffs were entitled to recover. Such a contract is valid under the repeated decisions of this court, and we are not concerned with the decisions of other courts upon the subject. Those who purchased in the usual course of trade would take a good title. Those who did not purchase in the usual course of trade could not rely upon the bare possession of their vendor as conclusive evidence of title."

Counsel for defendant claim that these two cases were really overruled by this court in *People* v. *Newman*, 99 Mich. 148 (57 N. W. 1073). We do not so understand it. The *Newman Case* did not involve the question of conditional sale. There the respondent was charged with selling beer at wholesale without having filed the bond and paid the tax required by law. His contention was that he was acting as agent of a brewing company, and he relied upon a contract, which appears in the opinion. The trial court instructed the jury that, under the terms of the contract there was practically a sale of the beer to the respondent, and that he was not an agent, but a purchaser. This court affirmed the conviction. In our opinion, the only cases in this court which might be claimed to be authorities against the application of the principle of conditional

Digitized by Google

sale, as heretofore stated, are *Choate* v. *Stevens*, 116 Mich. 28 (74 N. W. 289, 43 L. R. A. 277); *Van Den Bosch* v. *Bouwman*, 138 Mich. 624 (101 N. W. 832, 110 Am. St. Rep. 336); and *Coeling* v. *Green*, 163 Mich. 27 (127 N. W. 792). A careful examination of these cases discloses the fact that they fully recognize the principle enunciated by this court in the cases above quoted from. This becomes more evident by the fact that we have in the subsequent cases of *American Harrow Co.* v. *Deyo, supra, Bunday* v. *Machine Co., supra,* and *Worden Grocer Co.* v. *Blanding, supra,* carefully distinguished the *Choate* and *Van Den Bosch Cases* from the former cases, and reaffirmed the principle established in the earlier cases. As we said in the recent case of *Atkinson* v. *Japink*, 186 Mich. 335 (152 N. W. 1079), whether a sale of personal property is absolute or conditional depends upon the contract of the parties. The distinction attempted to be made by counsel for appellant was also attempted in *Mishawaka Woolen Manfg. Co.* v. *Westveer, supra,* in the circuit court of appeals, a case arising under the law of Michigan. In that case Judge Warrington said:

"It is argued that decisions passing upon contracts in terms reserving title in articles delivered for personal use of the original taker, like machinery, pianos, and sewing machines, are distinguishable from decisions under similar contracts relating to articles delivered for purposes of resale. We do not discover that the Supreme Court of Michigan has made such a distinction, and it is difficult to see any sufficient reason for its existence. Both classes of articles are delivered into the possession and control of the first taker, without notice to any other person of any title or interest retained in them. They are alike chattels, which, in such instances, connote ownership and the right of sale in their possessor. Any one having dealings in respect to them with a person in possession and control, without notice and for a present valuable consideration, ought to secure the same rights with regard to the one class as the other."

Digitized by Google

It is true that in that case the court held that it was within the principles of *Choate* v. *Stevens* and *Van Den Bosch* v. *Bouwman, supra.* The contract in that case differed from the contract in the instant case, in that there was nothing in the agreement in that case which purported to give title to the vendor in any of the proceeds of sale, whether received in the form of notes, accounts, or cash. That fact is pointed out by the court. In that respect the form of contract was changed before it was signed by Van Sickle. It is true that in *John Deere Plow Co.* v. *Mowry, supra,* Judge Denison said:

"It is true that in the *Mishawaka Case* there was special reliance on the fact that the contract did not attempt to preserve to the vendor a substituted title to the proceeds when the goods were sold, and that in the present case this reservation is, in terms, made; but we are not satisfied, taking all the conditions together, to treat this as a controlling distinction."

After a careful review of our own decisions, we are of the opinion that the position of the plaintiff is the correct one, and that the trial court reached the correct conclusion upon the subject. The views of the defendant cannot prevail without overruling the repeated decisions of this court which have become fundamental in business transactions in this State. The legislature can readily change the rule by requiring the recording of such contracts, as in the case of chattel mortgages. (See Act No. 64, Pub. Acts 1915.)

2. It is claimed that the reservation of title was fraudulent because the clause was in fine print, and the attention of the purchaser was not called to it. A *fac simile* of the contract is attached to the record. An inspection shows that the clause complained of was in the same sized type as the remainder of the contract. It was in the body of the instrument just above Van Sickle's signature. There is very little

Digitized by Google

other printed matter in the contract. He should have read it, and if he did not do so, he alone is to blame. In the stipulation of facts it is stated that:

"Plaintiff's agent called upon said Joseph D. Van Sickle and took an order for goods in the usual way, on blanks furnished by plaintiff."

There was no attempt on the part of plaintiff's agent to conceal this clause from Van Sickle. The latter had purchased goods in previous years of the plaintiff. It is fair to presume that the previous orders had been upon similar blanks. Weight must always be given to the fact of the execution of a contract; and the presumption which exists in favor of written instruments cannot be overcome, except upon evidence from which an inference of duress, deception, misrepresentation, substitution, or artifice is clearly deducible. Such evidence is wanting here. *Sullivan* v. *Ross Estate*, 98 Mich. 570 (57 N. W. 821), citing *Campau* v. *Lafferty*, 50 Mich. 114 (15 N. W. 40); *Houghton* v. *Ross*, 54 Mich. 335, 336 (20 N. W. 66). See, also, *Pettyplace* v. *Manufacturing Co.*, 103 Mich. 155 (61 N. W. 266); *Bonnott Co.* v. *Newman Bros.*, 108 Iowa, 158 (78 N. W. 817).

We find no error in the record, and the judgment of the circuit court is affirmed.

BROOKE, C. J., and KUHN, OSTRANDER, BIRD, MOORE, and STEERE, JJ., concurred.

The late Justice MCALVAY took no part in this decision.

Digitized by Google

FIRST NATIONAL BANK OF SAULT STE. MARIE *v.* ÆTNA INSURANCE CO.

INSURANCE—TRESPASS—LOGS AND LOGGING—MORAL HAZARD.

Under the provisions of a fire insurance policy on lumber which, without the actual knowledge of the insured, had been mixed with property taken from State lands, by acts of trespass (for which it had settled with the State after date of loss), the moral hazard was not so increased as to avoid the policy on the ground that the insured was not sole and unconditional owner, the value of the lumber owned by plaintiff and covered by the policy being in excess of the insurance.

Error to Chippewa; Fead, J. Submitted June 15, 1915. (Docket No. 43.) Decided September 28, 1915.

Assumpsit by the First National Bank of Sault Ste. Marie against the Ætna Insurance Company of Hartford, Connecticut, on a policy of fire insurance. Judgment for plaintiff. Defendant brings error. Affirmed.

Lucking, Helfman, Lucking & Hanlon (*M. H. Baxter*, of counsel), for appellant.

Warner & Sullivan, for appellee.

KUHN, J. This action is brought on a Michigan standard fire insurance policy issued by the defendant to the Northern Timber Company to cover lumber destroyed by fire at Perry's Landing, on the shores of Lake Superior, June 17, 1913, which policy was assigned after loss to the plaintiff. The treasurer of the assured, Mr. Stegeman, made verbal application to the defendant's agent for the insurance. The agent looked over the situation, and policies, including the one here in suit, were issued from time to time; the amount of

Digitized by Google

insurance being increased as the lumber was cut. At the time of the fire there was piled at Perry's Landing a little over 2,500,000 feet of lumber, of which the assured owned approximately 900,000 feet. The policies all described the property assured as "covering lumber, lath, and shingles, if any, owned by assured, or held in trust or on commission, or sold, but not delivered." The amount of insurance on the lumber of the Northern Timber Company was $5,000. The estimate of the value of the lumber covered by this insurance, made by Mr. Wright, an adjuster sent by the insurance company to adjust the loss, was $9,003. After the fire the State made a claim for the value of lumber which it was alleged had been taken from State lands, and a settlement was arrived at for the alleged trespassed lumber by the payment to the State of $1,450. There does not seem to be any dispute that the insured had no actual notice or knowledge of any claim as to trespassed lumber until after the fire. At the close of the testimony, it being stipulated by counsel that there were no facts to be submitted to the jury, the court directed a verdict for the plaintiff for the amount of the policy.

It is the contention of counsel for appellant that by reason of the trespassed lumber being mixed with the lumber of the insured there resulted a confusion of goods, and that the circuit judge erred in not charging the jury that the burden of distinguishing and pointing out its own lumber was upon the assured, who carelessly and wrongfully produced the confusion in mixing its own lumber with that of the State. The circuit judge, in directing a verdict, said:

"There is no evidence to substantiate the claim that any part of the trespassed timber was intermingled with the timber of the assured, or that the assured did not have unconditional ownership of the property covered by this policy."

Digitized by Google

It will be noticed that the policy did not cover all the lumber at the place where the fire occurred, but in express terms provided that it should cover only "lumber owned by the assured," the value of which, the record discloses, was considerably in excess of the total amount of the insurance. We are of the opinion that the question of the confusion of goods is not material, or of any consequence, in the case before us, as we are satisfied that the circuit judge was correct in charging that there was no evidence before the jury that the assured did not have unconditional ownership of the property covered by the policy.

As it appears that at the time of the insuring of the property the insured had no knowledge of the fact that trespassed lumber had become mixed with the lumber owned by it, and no knowledge of such claim was had until after the fire, it cannot be said that the mixing of the lumber increased the moral hazard. It is true that the parties to the insurance contract must be held to its terms, and, as was said by this court in *Wierengo* v. *Insurance Co.*, 98 Mich. 621 (57 N. W. 833), reaffirmed in *Wyandotte Brewing Co.* v. *Insurance Co.*, 144 Mich. 440 (108 N. W. 393, 6 L. R. A. [N. S.] 852, 115 Am. St. Rep. 458):

"An insurer is not required by the law to inquire into the condition of the title to the property insured, or to inform the insured of all the conditions and terms of the policy to be issued, or to read it to him, or inform him of its contents. When received and accepted without objection, he must be bound by its terms, unless these terms are waived by the insured. This is the law of contracts, and there is no reason or authority for holding that an insurance contract is an exception thereto."

In the instant case, however, if the insured had read the contract—which it may be assumed that it did—nothing would have been seen therein that is inconsistent with the true facts. There is no question here

Digitized by Google

of misrepresentation, or of fraud or concealment. The defendant's agent examined the property owned by the insured, which it is conceded was largely in excess of the amount of the insurance, and now, because a comparatively small amount of other lumber than that owned by the insured was mixed with that of the insured, unknown to it, it should not be said that the policy is void because the insured was not the sole and unconditional owner of the property insured.

Being of the opinion that the trial judge properly directed a verdict for the plaintiff for the reason stated, we affirm the judgment.

BROOKE, C. J., and STONE, OSTRANDER, and BIRD, JJ., concurred. MOORE and STEERE, JJ., did not sit.

The late Justice MCALVAY took no part in this decision.

FIRST NATIONAL BANK OF SAULT STE. MARIE *v.* CALEDONIAN INSURANCE CO.

Error to Chippewa; Fead, J. Submitted June 15, 1915. (Docket No. 44.) Decided September 28, 1916.

Assumpsit by the First National Bank of Sault Ste. Marie, against the Caledonian Insurance Company, a foreign corporation, upon a policy of fire insurance. Judgment for plaintiff. Defendant brings error. Affirmed.

Lucking, Helfman, Lucking & Hanlon, for appellant.

Warner & Sullivan, for appellee.

Digitized by Google

KUHN, J. This is a companion case of, and was submitted with, *First National Bank* v. *Insurance Co.*, *ante*, 251 (153 N. W. 1063), decided herewith. The same form of policy, the same state of facts, and the same legal questions are involved in this case as in that case, and therefore the decision herein is controlled thereby.

We therefore affirm the judgment of the court below.

BROOKE, C. J., and STONE, OSTRANDER, and BIRD, JJ., concurred. MOORE and STEERE, JJ., did not sit.

The late Justice MCALVAY took no part in this decision.

KANGAS *v.* CLEVELAND CLIFFS IRON CO.

1. MASTER AND SERVANT—MINES—TIMBERING—FELLOW SERVANTS. Evidence tending to establish that plaintiff, an experienced miner in defendant's employ, was injured by a fall of rock from an old stope below which his work was carried on, that the day shift which preceded him was charged with the duty of timbering the roof from which the fall took place, and that they omitted to block up the opening into the old stope, as they should have done, justified the trial court in directing the jury to return a verdict for defendant under the fellow-servant doctrine, since the failure of the men charged with the duty of putting in the sets so as to block up the alleged opening was the work of fellow servants of plaintiff whose duties in the night shift included the work of removing timbers from the drift and replacing them with new timbers.[1]

[1]On the responsibility of master for safe place to work when conditions are changing, see notes in 19 L. R. A. (N. S.) 340, 28 L. R. A. (N. S.) 1267.

As to servants in mine as fellow servants, see note in 50 L. R. A. 437, 461.

Digitized by Google

2. SAME—CON-ASSOCIATION RULE.

The so-called con-association rule, applied in Illinois and other States, that the employees must co-operate in the business in hand in the same line of employment, or that their duties should bring them into habitual association so that they might exercise a mutual influence on each other promotive of caution, etc., in order to make them fellow servants, has not been adopted in Michigan, and, hence, it is not the rule in this State that the employees must be engaged in common employment at the same time.

3. SAME—FELLOW-SERVANT RULE.

Those who serve the same master, work under the same control, derive authority and compensation from the same common source and are engaged in the same general business, though in different grades or departments of it, are fellow servants.

4. SAME—NON-DELEGABLE DUTIES—WARNING.

Defendant mining company was not liable to plaintiff for breach of the nondelegable duty to warn him of the danger from falling rocks, etc., where plaintiff was familiar with the work of retimbering, which it was usual for miners to do, and the men selected to perform the labor were competent and plaintiff was engaged with them in the work of making the place safe.

Error to Marquette; Flannigan, J. Submitted June 23, 1915. (Docket No. 27.) Decided September 28, 1915.

Case by Jacob Kangas against the Cleveland Cliffs Iron Company for personal injuries. Judgment for defendant on a directed verdict. Plaintiff brings error. Affirmed.

N. A. Ruonavaara and *Le Gendre & Driscoll*, for appellant.

William P. Belden and *Thomas Clancey*, for appellee.

KUHN, J. The plaintiff was injured while in the defendant's employ as a miner in the Lake mine, in

Digitized by Google

Marquette county, on May 18, 1910. At the time of the accident the mine was being operated by two shifts; the day shift commencing work at 7 o'clock and ending at 6 o'clock, and the night shift commencing at 7 o'clock and ending at 6 o'clock. These shifts were engaged in the work of removing certain old timbers from a sublevel and replacing them with new ones, because the pressure of the mine had gradually crowded the timbers down until the space in the drift had become too small to permit the tram cars to pass through. With this operation the plaintiff was familiar, as he had helped repair and fix up old timber sets before.

It is the claim of the plaintiff—and there is testimony in support thereof—that the men of the day shift were negligent in carrying on this work, in that they did not block up the space which was left between the top of the second set of timbers and the back of the drift or sublevel, and it is claimed that there was a hole which led from the opening at the top of the lagging up into an old stope, and that the rock which injured the plaintiff came down from the old stope, out through this hole, which was left by reason of the absence of blocking, and struck the plaintiff.

As it was conceded that, if the men who were charged with the duty of putting up these sets, putting in the lagging, and blocking it, had performed their duty, the accident would not have happened, the learned trial judge directed a verdict for the defendant, for the reason that, if the accident happened as claimed by the plaintiff, it was the result of the negligence of the fellow servants of the plaintiff, and not of any negligence on the part of the defendant, and that therefore the plaintiff could not recover.

Is is the contention of counsel for the appellant that the fellow-servant rule is not applicable in the instant case, because the employee who was

Digitized by Google

injured and the employees because of whose negligence the accident happened were not working for the same master *at the same time.* In support of their contention they invoke what is known as the "con-association doctrine" by the authorities. This doctrine is chiefly in vogue in the State of Illinois, and holds that, in order to constitute servants of a common master fellow servants, it is essential that they should at the time in question actually co-operate with each other in the particular business in hand in the same line of employment, or that their duties should be such as to bring them into habitual association, so that they may exercise a mutual influence on each other promotive of proper caution. See 4 Thompson on Negligence, § 4970; 26 Cyc. p. 1279; *Chicago, etc., R. Co.* v. *Moranda,* 93 Ill. 302 (34 Am. Rep. 168).

We cannot find, however, that this doctrine has ever found support in the decisions of this court. The definition of a fellow servant which has been approved repeatedly is found in *McCauley* v. *Railroad Co.,* 167 Mich. 230, 236 (132 N. W. 510, 512), where this court said:

"The general rule in this State, as repeatedly held by us, is that—

"'all who serve the same master, work under the same control, derive authority and compensation from the same common source, and are engaged in the same general business, though it may be in different grades or departments of it, are fellow servants.' *Adams* v. *Iron Cliffs Co.,* 78 Mich. 271-288 (44 N. W. 270, 18 Am. St. Rep. 441)."

In the application of this rule, it has never been held that the employees need be engaged in the same common work at the same time. It seems to be sufficient if they are in the employment of the same master, engaged in the same common work, and performing duties and services for the same general purpose. See *Hoar* v. *Merritt,* 62 Mich. 386 (29 N. W. 15); *Caniff*

Digitized by Google

v. *Navigation Co.*, 66 Mich. 638 (33 N. W. 744, 11 Am. St. Rep. 541); *Beesley* v. *F. W. Wheeler & Co.*, 103 Mich. 196 (61 N. W. 658, 27 L. R. A. 266); *Koskell* v. *Mining Co.*, 182 Mich. 586 (148 N. W. 699). It will be noted that in the instant case the day and night shifts were engaged in exactly the same work; the incoming shift simply taking the place of the outgoing shift. In the case of *Mirabile* v. *Murphy Co.*, 169 Mich. 522 (135 N. W. 299), a case relied upon by appellant, it appears that the plaintiff, who was a janitress in the Penobscot Building in Detroit, was riding up an elevator at the time of the injury, but she had not as yet reached the place where her work began. This court held that up until the time she actually began to work she was not subject to the fellow-servant rule, because the relationship of master and servant did not exist. Likewise in the case of *Moronen* v. *McDonnell*, 177 Mich. 691 (143 N. W. 8), although the plaintiff was an employee of the defendant, at the time of the accident he was not at work. The accident occurred during the noon hour, while the plaintiff was sitting on the grounds in the vicinity of the quarry, eating his dinner, and this court held that the relationship of master and servant did not exist

—"between him (the plaintiff) and defendant, in the strict sense requisite to make applicable the fellow-servant rule or the doctrine of safe place and duty to instruct due from master to servant."

Under the facts in this case, and under the law of this State as established by the decisions of this court, there can be no escape from the conclusion that the relationship of fellow servant between the employees of the day and night shifts did exist.

It is also urged by counsel for appellant that the defendant owed the plaintiff the nondelegable duty to warn him of the existence of the dangers in this case. There is no question made but that the plaintiff himself

Digitized by Google

was an experienced miner, and, as he himself stated, was familiar with the work in which they were engaged at the time of the accident, and that it was usual and customary for the miners to do the work of retimbering. There is no question but that the men whom the defendant selected for this purpose were skilled and experienced in this particular line of work, and that they were engaged in the work of making a safe place. We think what was said by this court in *Andrews* v. *Mining Co.*, 180 Mich. 72 (146 N. W. 394), is applicable here.

"Under the undisputed evidence in this case, as far as performing his work was concerned, plaintiff's decedent was engaged in making a safe place, and it is self-evident that it would be an impossibility for the defendant to cause the timbering in this stope to be done in advance for the protection of the men who themselves were specially employed to put in the timbering. The dangers were only those necessarily incident to the employment, changing from hour to hour, as the work progressed, and it is apparent that, by reason of the character of the work and the dangers attending it, miners of extraordinary skill and experience were selected, invested with power and authority to determine for themselves the safety of the place before going to work. This court has held that under circumstances of this character the doctrine of safe place does not apply. *Petaja* v. *Mining Co.*, 106 Mich. 463 (64 N. W. 335, 66 N. W. 951, 32 L. R. A. 435, 58 Am. St. Rep. 505)."

The absolute and nondelegable duty to warn arises in this jurisdiction as an incident of the defendant's duty to furnish and maintain a reasonably safe place for the plaintiff to perform his work. In the case before us the plaintiff himself was engaged in the very work of making the place safe, and, as we have stated, in such a case the doctrine of safe place does not apply. *Mikolojczak* v. *Chemical Co.*, 129 Mich. 80 (88 N. W. 75); *Koskell* v. *Mining Co., supra; Zap* v. *Mining Co.*,

Digitized by Google

184 Mich. 437 (151 N. W. 554); *Juntunen* v. *Mining* Co., 184 Mich. 341 (151 N. W. 571); *Mesich* v. *Mining Co.*, 184 Mich. 363 (151 N. W. 564); *Vrelenich* v. *Mining Co.*, *post*, 407 (154 N. W. 39).

Judgment is affirmed.

BROOKE, C. J., and STONE, OSTRANDER, BIRD, MOORE, and STEERE, JJ., concurred.

The late Justice MCALVAY took no part in this decision.

In re THAYER'S ESTATE.

THAYER v. THAYER.

1. APPEAL AND ERROR—UNDUE INFLUENCE—CURING ERROR.
   Any possible prejudice that may have resulted from submitting to a jury the question of undue influence in a will contest, or from admitting evidence upon the subject, was cured by a special finding that decedent was incompetent to execute a valid testamentary disposition of his estate.

2. WILLS—EVIDENCE—INCOMPETENCY.
   Evidence that the testator, whose will was offered for probate, suffered financial reverses, became moody, ceased to attend church and lost his affection for his family, accused his wife of extravagance and left his family without bidding them good-bye, later charging the wife with adultery without grounds therefor, and remaining away from them until his death, that he became possessed with the belief that some of his children were illegitimate and cursed them when they were referred to, *held*, to warrant

Digitized by Google

the determination of the jury that he was mentally incompetent.[1]

3. SAME—INSANITY—REPUTATION.

The trial court committed no error in admitting testimony that the wife's reputation for chastity was good, in a will contest wherein the contention was made that testator had an insane delusion or belief that she was guilty of infidelity.

4. SAME—REPUTATION—INSANITY.

In corroboration of the wife's denial that she had been unfaithful, the question what her reputation was in the community was not erroneous on the ground that her general reputation was in question.

5. WITNESSES—HUSBAND AND WIFE—PRIVILEGE.

Notwithstanding the privilege created by section 10213, 3 Comp. Laws (5 How Stat. [2d Ed.] § 12857), providing that neither husband nor wife shall, after marriage, be examined as to any communication made by one to the other during the continuance of the marital relation, the widow, in a contest concerning her husband's will, might properly be asked if the testator, who was claimed to have been laboring under an insane delusion that his wife was unfaithful, had ever accused her of infidelity.

Error to Ingham; Collingwood, J. Submitted June 29, 1915. (Docket No. 49.) Decided September 28, 1915.

Edson Thayer presented for probate the will of John Thayer, deceased. It was admitted in probate court and John Arthur Thayer appealed to circuit court. Judgment for contestant. Proponent brings error. Affirmed.

Person, Shields & Silsbee, for appellant.

McArthur & Dunnebacke (*Alva M. Cummins*, of counsel), for appellee.

KUHN, J. This litigation arises out of a contest

[1] As to insane delusions as affecting capacity to make will, see note in 12 L. R. A. 161, 27 L. R. A. (N. S.) 62.

Digitized by Google

with reference to what purported to be the last will and testament of John Thayer, deceased. He was born in the State of New York in 1843, and in 1871 was married at Mason, Mich. As a result of this marriage five children were born. One died, and at the time of the trial there were surviving, his widow, Mary Thayer, and four children, Arthur, Frank, Bertha, and Fred. John Thayer had a brother, Edson Thayer, who survived him and was the sole devisee and beneficiary named in his will. John Thayer and his family lived at first on a 90-acre farm, and afterwards on a 40-acre farm, in Ingham county, until 1891, when he went to Dakota to work in harvest time, and with the exception of a short visit home that winter and in 1900 he remained there until 1910, when he returned to Michigan and lived with his brother Edson the remainder of his life. In 1900, while in Dakota, he filed a bill for divorce, and charged on information and belief that his wife committed adultery with one Henry Wrang on the farm in Ingham county. The wife appeared in the suit, filed an answer, and a decree of divorce was awarded her, which provided also that the 40 acres, the homestead in Ingham county, be assigned, transferred, and set over to her. Subsequently she filed a bill against John Thayer and Lafayette Near, who held the paper title to the farm, in the Ingham circuit court in this State, seeking to have the order of the South Dakota court as to the real estate enforced and the 40 acres turned over to her. John Thayer appeared, and the bill was dismissed. In 1907 she filed a bill for divorce in the Ingham circuit court, to which John Thayer filed an answer, but the case does not seem to have been finally disposed of.

The will in question was made on December 28, 1910, at the office of John I. Carpenter, an attorney in the city of Lansing, and at the same time his brother, Edson Thayer, also made a will, naming John Thayer

Digitized by Google

as his sole beneficiary and devisee. John Thayer's will was duly admitted to probate, and on an appeal to the circuit court by Arthur Thayer, one of his sons, a verdict was rendered in favor of the contestant. Two propositions on the trial were insisted upon by the contestant, viz., that the will was made and executed as the result of undue influence and duress exercised over John Thayer by his brother, Edson A. Thayer, and that at the time of making and signing the will John Thayer was mentally incompetent to make and execute the same. There was submitted to the jury, at the request of counsel for contestant and appellee, the following special question:

"Was the testator, John F. Thayer, at the time of making the will in question, mentally incompetent to make the same, by reason of an insane delusion or delusions, as claimed by the contestant in this case?"

This was answered "Yes" by the jury. There are 134 assignments of error, which in a large measure refer to rulings of the court upon the admission and rejection of testimony.

Counsel for appellant urge strongly that the court was in error in submitting to the jury the question of undue influence, as it is claimed that the record is entirely barren of any competent testimony in support of this claim of the contestant. But in answer thereto it is said that, even if this were conceded, it would be wholly immaterial, as, the jury having found by its answer to the special question which was submitted to it that the testator was mentally incompetent to execute the will in question, the will cannot stand, irrespective of the question of undue influence. While we are not satisfied that it can be said that there was no evidence of undue influence which warranted the submission of that question to the jury, in our opinion, even if there were none, the error committed in submitting the question must be said to have been harm-

Digitized by Google

less, in view of the special finding of the jury on the question of mental competency.

It is also proponent's claim that there is no competent proof in this record of mental incompetency on the part of the deceased. With this we cannot agree. It is the claim of the contestant, upon this branch of the case, that, when John Thayer and his family left the 90-acre farm and moved on the 40-acre farm because of financial reverses, it marked a complete change in his life. Before that time, it is claimed that he was in all respects a normal man, kind to his children, an habitual attendant at church, and public-spirited. After a short stay on the smaller farm he began to brood, stopped work, stayed away from church, and instead of loving his family began to curse them. He at first began to accuse his wife of extravagance, and in August, 1891, left for Dakota without saying good-bye to any member of the family or telling them how long he was going to stay away. He remained away until Christmas time, and returned on Christmas eve, unannounced, and the family on returning from Christmas exercises found him in the house, at which time he did not kiss or shake hands with any of his children. He left again in March, 1892, without saying good-bye to any of his children, not even bidding farewell to his eldest son, Arthur, who took him to the train.

It appears that while in Dakota he cherished a violent dislike and resentment toward his wife and his children, and in 1900 filed the bill charging his wife with adultery on information and belief. In 1907, in the answer which he filed to the bill filed by his wife in this State, he alleged that "in the spring of 1892, he personally detected her in an act of illicit carnal intercourse and adultery, at their residence, with one Henry Wrang." It is the claim of the contestant that there was absolutely no ground for this charge, and that it was the product of an insane delusion. This it is

Digitized by Google

claimed is evidenced by the fact that, when the charge is first made in 1900, he claimed knowledge of it on information and belief, and seven years later claims to have personally detected it, and also by the fact that the proofs show that Henry Wrang was not in Aurelius township, where the farm is located, in 1892, and had not been seen by any member of the family for years, and that he also became obsessed with the insane delusion that his youngest boy was illegitimate, and on referring to his children called them vile names. It will be impossible to review the testimony of witnesses who described his conduct during his stay in Dakota, and told about his cursing and swearing and the excitable condition of mind he got into when the names of his wife and family were mentioned. It will be sufficient to say that in our opinion there was abundant testimony to warrant the court in submitting to the jury the claim of contestant that his father was suffering from an insane delusion, and that the will as made was a result thereof.

Many of the assignments of error relate to testimony concerning the question of undue influence, and we are satisfied after reviewing this testimony that any errors committed in the admission or rejection of testimony with relation thereto were harmless, for the reason mentioned above—that the will must necessarily fall because of the determination of the jury of the special question as to mental incompetency.

Assignments of error are based on the method of proving the chastity of the testator's wife, and the competency and materiality of such testimony. To illustrate the character of this proof: The witness Sarah Phillips was asked the following question, after showing that she had known Mary Thayer for 40 years and lived on an adjoining farm:

"*Q.* I want to ask you, Mrs. Phillips, if you know

Digitized by Google

what her reputation has been for chastity in that community?

"*Mr. Shields:* That is objected to as incompetent and immaterial.

"*The Court:* You may have an exception.

"*A.* It has been the very best. I never heard it questioned in any way."

That such evidence is permissible in a suit of this kind, we think is settled by the decision of this court in *O'Dell* v. *Goff*, 153 Mich. 643 (117 N. W. 59).

It is also contended that the form of the question was improper, as it should have been directed to her "general reputation." We do not think it was necessay to include the word "general" in a question of this kind, as it would not be necessary in case the inquiry related to the general reputation of the witness in other respects. When it is sought to impeach a witness by showing that his general reputation for truth and veracity is bad, the rule contended for applies; but a distinction is made when it is sought to "impeach" a witness and when it is sought to "sustain" one. The distinction is pointed out in *Lenox* v. *Fuller*, 39 Mich. 268, where the court said:

"Where, however, the witness is not called to *impair* but to *support* credit, the ground is different. Not to have been talked about at all in regard to integrity is not to have been talked against, and it is not objectionable to show that the veracity of the witness has not been questioned."

So in the instant case we think it was unobjectionable to show that the chastity of Mrs. Thayer had not been questioned in the neighborhood in which she lived.

Objection is made that the testimony of Mary Thayer should not have been received because of the prohibition contained in section 10213, 3 Comp. Laws (5 How. Stat. [2d Ed.] § 12857). The material part

Digitized by Google

of the section to be considered is contained in the following language:

"Nor shall either, during the marriage or afterwards, without the consent of both, be examined as to any communication made by one to the other during the marriage."

The language "as to any communication made by one to the other during marriage" relates only to such communications as were recognized as "confidential communications" at the common law. See *Hagerman* v. *Wigent*, 108 Mich. 192 (65 N. W. 756); *Ward* v. *Oliver*, 129 Mich. 301 (88 N. W. 631). The wife was asked whether the husband had ever accused her of unchastity in any way, and she was allowed to answer "No." This, in our opinion, does not come within the prohibition of the statute, as the testimony was not offered and did not show any communications between the parties, but rather the absence of them. We do not find in the other questions and answers objected to anything that can be said to have been a confidential communication.

By other assignments of error, criticism is made of the charge of the court, of certain answers to hypothetical questions, and conduct of counsel. We have examined them all, but do not find any prejudicial error committed by the trial judge. As we have said, we are of the opinion that there was sufficient evidence to warrant the jury in finding the testator to have been possessed of insane delusions, which affected the testamentary disposition here in question, under the following authorities: *Haines* v. *Hayden*, 95 Mich. 332 (54 N. W. 911, 35 Am. St. Rep. 566); *Rivard* v. *Rivard*, 109 Mich. 98 (66 N. W. 681, 63 Am. St. Rep. 566); *In re Mansbach's Estate*, 150 Mich. 348 (114 N. W. 65); *O'Dell* v. *Goff*, 149 Mich. 152 (112 N. W. 736, 10 L. R. A. [N. S.] 989, 119 Am. St. Rep. 662);

Digitized by Google

Id., 153 Mich. 643 (117 N. W. 59). The rule is well stated in *Rivard* v. *Rivard, supra:*

"Counsel ignore the other well-settled rule—that, while a man may be possessed of such capacity, he still may be unable to execute the will in question, on account of some delusion which has beclouded or taken away his judgment in regard to those who are the natural objects of his bounty. If a testator disinherits a daughter upon the belief that she is a bad woman, or that she is not his own offspring, or a son upon the belief that he is a drunkard, or his grandchildren upon the belief that his son-in-law has threatened to kill him, and it appears that there is no foundation in fact for any such beliefs, and they are shown to be mere delusions, a will disinheriting such children and grandchildren is void, notwithstanding he was entirely sane upon every other subject, and fully competent to manage his business affairs."

This issue with reference to the mental competency, in our opinion, was submitted to the jury with proper instructions, and, finding no prejudicial error in the record, we affirm the judgment of the court below.

BROOKE, C. J., and STONE, OSTRANDER, BIRD, MOORE, and STEERE, JJ., concurred.

This is a case which was assigned to the late Justice MCALVAY, remaining undetermined at the time of his death.

Digitized by Google

PRYZBYLOWSKI *v.* BOARD OF COMMISSIONERS OF THE POOR OF THE CITY OF DETROIT.

1. MUNICIPAL CORPORATIONS—CITIES—DETROIT CHARTER—PAUPERS—BOARD OF POOR COMMISSIONERS—CIVIL SERVICE.

   Under the various local and public acts constituting the charter of the city of Detroit, it was provided that the board might make disbursements from the county temporary relief fund, as formerly authorized by city aldermen (Act No. 253, Local Acts 1883, sec. 5), and by said act authority was withdrawn from the county superintendents of the poor to administer relief in the city. It was also provided that the board might expend State funds to relieve persons who should become a public charge in a place other than their home, but in no case was it empowered to administer relief outside the city; *held*, that the duties of such board were local in character and that it did not become a State agency in such sense as to exclude the board from the operation of the civil-service amendment to the charter of the city of Detroit, which classifies the city physician as subject to civil service and renders such official removable for cause only.

2. SAME—STATUTES—DETROIT CHARTER—AMENDMENTS.

   The intention indicated by such amendment to the city charter being to affect the local acts that gave the board its authority, by a reasonable construction of the language of the amendment, no ground for excepting them from such operation could be gathered from the titles of the special acts, because it was not thereby expressly declared that they were amendments to the Detroit charter.

3. SAME—CHARTERS—CIVIL SERVICE—AMENDMENTS—REPEAL.

   By charter provisions enacted by the people of the city, adopting a new and comprehensive system of civil service as to all offices, departments and commissions, special acts and legislation in force relating to appointments and removals were repealed or amended, though the later enactment contained no express repealing clause.

Digitized by Google

Certiorari to Wayne; Murphy, J. Submitted July 23, 1915. (Calendar No. 26,851.) Decided September 28, 1915.

Mandamus by Felix J. Pryzbylowski against the Board of Commissioners of the Poor of the city of Detroit and others, to require the respondent to reinstate relator as city physician and for other relief. From an order granting the writ, respondents bring certiorari. Affirmed.

Schmalzriedt, Spaulding & Toms, for relator.

James H. Lee, for respondents.

STONE, J. Certiorari to the circuit court for the county of Wayne. As stated by counsel for respondents and appellants, the sole question here presented is whether or not the board of poor commissioners of the city of Detroit is, by reason of the functions it performs, a State agency, and therefore not subject to the civil-service amendment to the charter of the city of Detroit in the choice of and the discharge of its subordinates.

Relator was a city physician, who had been appointed to such position by the board of poor commissioners previous to the passage of the civil-service amendment of the charter of said city, and he was holding his said office at the time the said amendment was adopted. On July 1, 1914, the relator was discharged from said office of city physician by the said board, and his successor appointed, without complying with the rules and regulations of the civil-service amendment. The board seeks to justify its action on the ground that it is a State agency, performing a function of the State, *i. e.*, the preservation of the health of the people of the State, and that it is therefore not subject to said civil-service amendment, any more than the Detroit board of health,

Digitized by Google

or the Detroit school board, or the recorder's court of the city, all of which have been determined to be State agencies, and not subject to said civil-service amendment.

On July 21, 1914, a petition for a writ of mandamus was filed by the relator in the said circuit court, praying that said board be compelled to reinstate him in the said office of city physician, and to place his name on the pay roll as such, and also directing the city controller and city treasurer to pay or cause to be paid to relator his salary as city physician from July 1, 1914, to the date of his reinstatement. An order to show cause was granted, respondents answered, a hearing was had, testimony taken, and upon the hearing an order was made and entered, allowing the prayer of said petition, and a peremptory writ of mandamus was issued to said respondents, directing that relator be reinstated, and his salary paid as prayed for. The case is here upon a writ of certiorari sued out by respondents.

The civil-service amendment to the charter of the city of Detroit provides that (with certain enumerated exceptions, none of which are involved in this case):

"All officers, clerks and subordinates of all offices, departments and commissions of said city whether now existing or hereafter created, shall be selected and appointed as herein provided, but the officers, clerks and other employees in the service of said city, when this amendment shall take effect, unless removed for cause, shall be entitled to retain their positions, except as herein otherwise provided."

While the local acts creating the board of poor commissioners of the city, and the office of city physicians, and prescribing their duties, are not designated specifically, in their title or wording, as parts of or amendments to the city charter, this fact does not except them from amendment by the people, if the intention

Digitized by Google

to make such amendment appears by reasonable construction of the language of the charter amendment.

The charter as it stood prior to May 3, 1913, provided distinct and various methods of appointment and removal of officers, clerks, and subordinates in the several departments. By this amendment a new and comprehensive system of civil service was established, placing the appointment and discharge of employees of "all offices, departments and commissions" on a uniform footing, and placing all appointments and removals under the supervision of a civil service commission. Such amendment must necessarily repeal all, or supersede all special acts relating to appointments and removals in individual departments, even though it contains no express repealing clause. *Grobbel* v. *Board of Water Commissioners*, 181 Mich. 364 (149 N. W. 675).

As we understand the claim of respondents, it is that the board of poor commissioners is not a part of the city government, but a State agency, and that its duties are not local, but State-wide, in character, and that, consequently, it is subject to control by the legislature only, and not by the people of the city. This claim is based on the recent decision of this court in the case of *Civil Service Commission* v. *Engel*, 187 Mich. 83 (150 N. W. 1081), which followed the rule laid down in *Davock* v. *Moore*, 105 Mich. 120 (63 N. W. 424, 28 L. R. A. 783). In these cases the care of the public health was held to be a part of the police power which is inherent in the State, for the protection of the people of the State at large. In like manner the police force and criminal courts of local jurisdiction have been held to be State agencies for the preservation of public order and morals. *People* v. *Mahaney*, 13 Mich. 481; *People* v. *County Auditors*, 13 Mich. 233; *People* v. *Reilly*, 53 Mich. 260 (18 N. W. 849).

Digitized by Google

On the other hand, a large number of cases can be cited holding various activities of the city government to be of a local character, subject to local regulations, and wholly beyond the power of the State to regulate in any way which would interfere with the rights of local self-government. Among such cases are the following, relating to public works: *People* v. *Hurlbut*, 24 Mich. 44 (9 Am. Rep. 103); *Moreland* v. *Millen*, 126 Mich. 381 (85 N. W. 882). Relating to parks: *Board of Park Commissioners* v. *Common Council*, 28 Mich. 228 (15 Am. Rep. 202); *Attorney General* v. *Lothrop*, 24 Mich. 235; *Attorney General* v. *Bolger*, 128 Mich. 355 (87 N. W. 366). Relating to highways: *Davis* v. *Board of Supervisors*, 89 Mich. 295 (50 N. W. 862); *Hubbard* v. *Township Board of Springwells*, 25 Mich. 153; *Wayne Co. Road Commissioners* v. *Auditors*, 148 Mich. 255 (111 N. W. 901). Relating to waterworks: *Blades* v. *Board of Water Commissioners*, 122 Mich. 366 (81 N. W. 271). Relating to fire department: *Davidson* v. *Hine*, 151 Mich. 294 (115 N. W. 246, 15 L. R. A. [N. S.] 575, 123 Am. St. Rep. 267, 14 Am. & Eng. Ann. Cas. 352).

The department of waterworks and fire department, much like the board of poor commissioners, have to do with the furnishing of necessities or comforts of life for individuals located within the boundaries of the municipality. The system of poor relief is maintained for the benefit of the local community, and does not directly affect any person who is not, at least temporarily, an inhabitant of or found within the city. This is true, as well, of that part of the system which furnishes medicines and medical attention to those unable to pay for them, as of that part which furnishes fuel and clothing to those in the same condition. The fact that certain duties of the poor commission indirectly or casually affect the public health does not deprive the commission of its local character or trans-

Digitized by Google

fer it to State control. We think that an examination of our statutes relating to the support of the poor will show that this has always been treated as a local function.

It is contended by the respondents that, although some of the duties of the board may be local, yet it is constituted a State board by reason of the fact that it expends State and county money for certain purposes. The expenditure of State money is authorized by section 8 of Act No. 72, Pub. Acts 1907, which regulates the granting of relief to persons who become a public charge in a place other than their home. This act, as well as the prior legislation, is inconsistent with the theory that the support of the poor is a State duty. The fact that the State in certain cases refunds the cost of support does not take from the board which furnishes it its local character. In fact, the local character of the board is emphasized by its not being permitted to go outside its own territorial limit to furnish relief directly to its own citizens.

The board of poor commissioners is authorized to make disbursements from the county temporary relief fund by section 5 of Act No. 263, Local Acts 1883 (section 505, Compiled Charter), which reads as follows:

"The said board of poor commissioners shall perform the duties and make the disbursements out of the county temporary relief fund now authorized by the statutes of this State to be made by the aldermen of each ward in the city of Detroit, whose term of office will soonest expire, in the capacity of supervisors of their respective wards, and the said board is vested with all the power and duties of the aldermen as such supervisors relative to the support of the poor. The county superintendents of the poor shall have no power to grant any temporary relief in the city of Detroit, but all such relief from the county temporary relief fund shall be granted by said board, and the said board

Digitized by Google

may draw its warrants on the county treasury therefor."

This section is in harmony with the general system of poor relief requiring aid to poor persons within the city to be given by city authorities, but not to be charged against city funds, when the persons aided are nonresidents. The duties of the board are strictly localized. The above section merely transfers an already existing duty from one agency to another, imposing upon the board of poor commissioners duties formerly belonging to the aldermen of the several wards in their capacity as supervisors of the county. It would hardly be argued that the performance of this duty by the aldermen made them State officers, or the agency a State agency.

The act relating to city physicians nowhere requires or authorizes those officers to work outside the city. Their duties are prescribed by section 3 of Act No. 343, Local Acts 1891 (section 516, Compiled Charter), as follows:

"Said physicians shall perform such duties and observe such rules and regulations in the care and treatment of the sick poor of the city of Detroit, as the board of poor commissioners of said city may direct and make, and shall perform such further duties and receive such compensation as the common council of said city may prescribe."

Even if the board be regarded as having a dual character, and as performing duties both for the city and State, the city physicians are limited by this section to that branch of the board work which lies within the city, and is within the scope of regulation by the common council and the local government. We think that the case of *Civil Service Commission* v. *Engel, supra,* is readily distinguished from the instant case.

In our opinion the city physicians are within the classified service of the city as defined by the civil-

Digitized by Google

service amendment, and cannot be removed from office, except for the causes and in the manner provided by that amendment.

The order of the circuit court is therefore affirmed.

BROOKE, C. J., and KUHN, OSTRANDER, BIRD, MOORE, and STEERE, JJ., concurred.

The late Justice MCALVAY took no part in this decision.

AKERS *v.* MEAD.

1. DEEDS—EVIDENCE—UNDUE INFLUENCE—COMPETENCY.
   In reviewing, on appeal, a decree of the circuit court involving issues of fact relative to the validity of a deed of decedent to his daughter, evidence considered in the light of the presumptions arising from the opportunity possessed by the circuit court to hear and see the witnesses, and *held*, to sustain the validity of the conveyance.

2. SAME—UNDUE INFLUENCE.
   In order to sustain a deed it is not essential that absolute freedom from influence should appear; the question being whether such influence was exerted as to take away the grantor's freedom of disposition. Weakness of mind or forgetfulness are not sufficient to invalidate a will or deed, if it appears that the mind of the grantor was capable of attention and exertion when aroused and was not imposed upon. If capacity exists the court will not undertake to measure the degree of the capacity. Eccentricity, unless it take the form of monomania, will not incapacitate one from making a valid conveyance or will.[1]

[1]As to undue influence in conveyance or transfer of property in consideration of support of the grantor or a third person, see note in 52 L. R. A. (N. S.) 476.

Digitized by Google

Appeal from Ingham; Collingwood, J. Submitted June 30, 1915. (Docket No. 106.) Decided September 28, 1915. Rehearing denied December 22, 1915.

Bill by George W. Akers and others against Eva J. Mead to set aside a certain deed. From a decree for defendant, complainants appeal. Affirmed.

L. B. Gardner and *Frank L. Dodge*, for complainants.
Cummins, Nichols & Rhoads, for defendant.

STONE, J. In this cause the bill was filed to set aside a deed bearing date February 14, 1911, made and executed by Aaron K. Akers to the defendant, of all the real estate which he owned, upon the grounds that at the date of its execution Aaron K. Akers was mentally incompetent to execute it, and that the same was procured by the fraud and undue influence of the defendant. At the hearing there was no evidence that John F. Krumbak was the administrator of the estate of said Aaron K. Akers, and under the plea filed the bill was dismissed as to the administrator, and the case proceeded as between George W. Akers and Charles A. Akers, two of the four children and heirs of Aaron K. Akers, complainants, and the defendant, a third child and heir. The heirs of Belle Monroe, deceased, the other child and heir of Aaron K. Akers, are not parties to the suit.

The circuit judge, who heard the case, and heard and saw all of the witnesses testify, filed a written opinion, from which we quote as follows:

"The bill alleges: That said Aaron K. Akers was the father of complainants George W. Akers and Charles A. Akers, and of defendant Eva J. Mead. That the wife of Aaron K. Akers, who was the mother of the parties above named, died on the 17th day of January, 1911. That Aaron K. Akers died on the 22d day of February, 1911. That during his lifetime he

Digitized by Google

was the owner of certain real estate, described in the deed, a copy of which is attached to the bill of complaint. That after the death of Aaron K. Akers defendant Eva J. Mead claimed title to this real estate by virtue of a warranty deed, dated February 14, 1911, purporting to be signed by said Aaron K. Akers and duly recorded. That at the time when this deed was purported to have been executed said Aaron K. Akers was more than 80 years of age, and was at the time of making the deed in question utterly incompetent and mentally incapacitated to transact any business, and especially of knowing what he was doing at the time of executing the deed in question. That at the time when this deed was purported to have been made and executed said Aaron K. Akers was by reason of his age and circumstances, and while living with defendant, under the absolute control of and actually dominated by the said defendant Eva J. Mead, who wrongfully, unjustly, and fraudulently exerted over said Aaron K. Akers an undue influence, and obtained said deed without any valuable or adequate consideration. The bill prays that said deed be vacated, canceled, set aside, and held for naught, and the record thereof canceled.

"A large amount of testimony was offered by both the complainants and the defendant, and the life and surroundings of the Akers family, for the past 30 years, quite fully revealed. It was shown that at the time of his death Aaron K. Akers was about 86 years old; that up to about 30 or 40 years ago he had been somewhat intemperate, although since that time he had not used liquor of any kind. He was uneducated, being unable to read or write. For more than 50 years previous to the summer before his death, he and his wife had lived continuously on the farm described in said deed. For more than 30 years he had not been actively engaged in farming operations, but had rented the several fields. During that time he went often to Williamston, went about the neighborhood, both in a carriage and on horseback, and conducted the small affairs intrusted to him with more or less ability. The proofs show that he was an eccentric old man, with the physical and mental infirmities incident to age. During the summer of 1910 Aaron K. Akers and his wife went to live with the daughter, Eva J. Mead, on

Digitized by Google

her farm. While there he made a will. This will was afterwards declared to be void, for want of capacity in the maker, Aaron K. Akers, first by the probate court, and afterwards by a jury in the circuit court of this county. About the middle of January, 1911, while Mr. and Mrs. Aaron K. Akers were at the home of the defendant, Eva J. Mead, Mrs. Akers, the wife and mother, died. There is considerable testimony, both before and after the death of Mrs. Akers, regarding the condition of Aaron K. Akers. That he was a childish old man, physically, and at times mentally weak, is clearly established. But in the words of Justice CHRISTIANCY, in *Seeley* v. *Price*, 14 Mich. 545:

"'The evidence fails to establish insanity, idiocy, or that degree of mental imbecility which would of itself render the grantor entirely incapable at the time of executing a valid deed.'

"It was shown by uncontradicted testimony that on the evening before the deed was executed Aaron K. Akers was in such possession of his faculties of mind that he declared his intention of deeding his property to his daughter Eva, and he could and did, from memory, and without prompting, give a full and accurate description of the lands in question. On the following day he executed the deed in the presence of two witnesses. These two men, without apparent prejudice, and without any interest in the case, were at the home of Eva J. Mead for the purpose of making and attesting this deed, if Aaron K. Akers were, in their judgment, competent to understand and make a deed. Each of the witnesses was a reputable and experienced man, one a lawyer and the other a physician. They went there prepared to test the competency of Aaron K. Akers to make a deed, and after talking with him they were satisfied. The testimony shows that the deed was drawn in his presence and read over to him twice, before he, in their presence, affixed his mark, and that in the opinion of these witnesses he could understand and did understand the provisions thereof. It is the opinion of this court that the deed in question was executed by Aaron K. Akers, and that at the time he was of sufficient mental capacity and ability to understand its provisions and to transact the business of transferring the real estate.

Digitized by Google

"Under the allegations of the bill, a second question arises: Did Eva J. Mead exert an undue influence on Aaron K. Akers, and secure this deed by fraudulently dominating his will? The provisions of the deed were such that Eva J. Mead, defendant, agreed to and was bound to suitably support and maintain Aaron K. Akers during his lifetime, and provide proper burial after his death. While at the date of the deed Mr. Akers was a feeble old man, and died in 10 days, his condition was such that he might have lived several months or even years. There is nothing in the testimony, or in the provisions of the deed, which would make its execution, under all the circumstances, unreasonable. The testimony shows that, during the past 30 years, the bonds of affection between the different members of the Akers family had been, at times, sadly strained. But there is nothing, as shown by the evidence, in the treatment of Eva J. Mead, defendant, especially during the past year of their lives, inconsistent with daughterly conduct. Aaron K. Akers might well have believed that, under all the circumstances, this was the best disposition he could make, for his own good, of his property.

"The court does not find the allegations of the bill sustained by the evidence. The bill is dismissed, with costs."

At the hearing we were in doubt whether the circuit judge had reached the correct conclusion. A careful reading of the voluminous record has satisfied us that his conclusion was warranted by the weight of the evidence. The testimony was very conflicting, and a careful and scrutinizing examination of it is necessary to reach a just conclusion. We have no doubt of the mental capacity of Mr. Akers at the time the deed was executed. The uncontradicted evidence shows that he knew what property he had, as well as the situation of the children and heirs. There is no doubt that the defendant had at all times treated both her father and mother with greater consideration than had the other children. The complainant Charles seemed to recognize that fact when, in a letter written to defendant on

Digitized by Google

January 23, 1911, upon hearing of the death of his mother, he said:

"I am certain you have done all you could for Ma and Pa, situated as you were, without any help. * * * I feel that you should have good pay for what you have done for them, as the rest of us have never done anything toward looking after them."

The defendant had had the full care of both parents. In the summer of 1910 the parents reached a time when they were no longer able to live alone and take care of themselves, and they went to live with defendant, and remained with her as long as they lived, and nobody claims that they were not properly cared for. It is true that Mr. Akers lived but a short time after he executed the deed, but his death was unexpected. Charles had been there in December and early in January, and, while he considered his father feeble, yet he wrote just following the father's death:

"It was a great surprise to me, as I thought he would live several years yet."

It is urged by complainants' counsel that the agreement by the defendant to care for her father was not binding upon her; she being a married woman. It is not necessary for us to discuss that question, for the reason that that part of the contract was in fact fully carried out and performed.

In our opinion, the question of undue influence is the most meritorious question in the case. We have examined the evidence bearing upon that subject with care. We shall not undertake to analyze the evidence upon that subject. Our conclusion is well expressed by the language approved by this court in *Schneider* v. *Vosburgh*, 143 Mich. 476, at page 479 (106 N. W. 1129, at page 1130):

"Again, it is not necessary, in order to sustain either a deed or a will, that there should be an absolute freedom from influence shown. There is no testator or

Digitized by Google

grantor, under the circumstances shown in this case, absolutely free from influence. The test is: Were such influences applied as to take away his freedom of disposition? If so, if his will was overcome by force, either physical or moral, or perverted by fraud, then a testamentary disposition of the property or a deed so made cannot stand.

"Weakness of mind and forgetfulness, therefore, are not sufficient to invalidate a will or deed, if it appears that the testator's or grantor's mind was capable of attention and exertion when aroused, and was not imposed upon. It has been truly said that the weak have the same right with the prudent and strong-minded to dispose of their property. In general, so that capacity exists, courts will not undertake to measure the degree of that capacity, and they will protect those deficient in strong natural ability in the exercise of the powers they possess. Eccentricity, unless it take the form of monomania, will not incapacitate a man from making a will or a conveyance of his property."

We have examined the cases cited by counsel; but, as we have often said, previous decisions are of little assistance in determining these questions, and each case must be determined upon its own facts. A man addicted to the habitual use of intoxicating liquors and tobacco, who voluntarily abandons the habits, and persists therein, and leads a temperate life for more than 20 years before his death, must be something more than a mere weakling. This Mr. Akers did. Many reasons may be gathered from the evidence, consistent with freedom of action, which induced Mr. Akers to make the disposition of his property which he did. A perusal of the testimony will disclose these reasons.

The decree is affirmed, with costs to the defendant.

BROOKE, C. J., and KUHN, BIRD, MOORE, and STEERE, JJ., concurred. MCALVAY and OSTRANDER, JJ., did not sit.

Digitized by Google

JANKOVICH *v.* WAYNE CIRCUIT JUDGE.

AMENDMENTS — DIVORCE — ORDER OF PUBLICATION — STATUTES — EQUITY—ORDERS—IRREGULARITY.

A mistake in the order for appearance of defendant in a divorce proceeding resulting in the order fixing a period for defendant to appear of four months instead of five, as it ought to have required, where complainant's solicitor corrected the error, and caused the order to be correctly published, was open to amendment, and should have been corrected at the hearing by the circuit judge, nobody having suffered any prejudice. 3 Comp. Laws, § 10268 (5 How. Stat. [2d Ed.] § 12969).

Mandamus by Dusanka Jankovich against George L. Hosmer, one of the circuit judges for the county of Wayne, to require respondent to grant leave to relator to amend an order of the court. Submitted July 23, 1915. (Calendar No. 26,833.) Writ granted September 28, 1915.

Ira J. Pettiford, for relator.

KUHN, J. The relator, through her counsel, made a motion before respondent to amend an order theretofore made in a divorce proceeding pending, which motion being denied, mandamus is sought in this court.

The facts with relation thereto are as follows: The relator filed a bill for divorce against her husband on the grounds of extreme and repeated cruelty and desertion, and on the 14th of April, 1914, made an affidavit for an order of publication, to the effect that the defendant be required to have his appearance filed within a certain time as required by the statutes of this State relative to service upon nonresident defendants. This affidavit for the order of publication,

Digitized by Google

together with a "proposed order of publication," was presented to the then domestic relations judge and *ex officio* circuit judge for Wayne county. It is claimed that in writing this order for publication the stenographer by mistake put in "four months," instead of "five months," and it was signed by the judge in the form in which it was presented. The error was subsequently discovered by the solicitor for complainant, and corrected while in the office of the publisher, and the words were changed to "five months," instead of "four months," and as such the order was duly published as required by statute. On the 19th of September, 1914, the proper affidavits were filed and the cause noticed for hearing. It came on to be heard by the respondent, who refused to allow the cause to be heard because of the insufficiency of the said order of publication, being of the opinion that he was without jurisdiction.

The signing of the erroneous order did not, in our opinion, affect the jurisdiction of the court, and the question of the sufficiency of the order is properly raised, being in the proceeding itself. It was clearly an erroneous order made by the domestic relations judge. It being a statutory proceeding, it would necessarily result in making the proceedings irregular and voidable. In our opinion, however, it was within the power of the court, under our statute of amendments, to have corrected the error; the statute (section 10268, 3 Comp. Laws, being section 12969, 5 How. Stat. [2d Ed.], providing as follows:

"The court, in which any action shall be pending, shall have power to amend any process, pleading, or proceeding in such action, either in form or substance, for the furtherance of justice, on such terms as shall be just, at any time before judgment rendered therein."

When the amendment sought is in the furtherance of justice, and neither surprises nor deprives the oppo-

Digitized by Google

site party of any essential rights, under our decisions it should be permitted. See cases cited in note to statute. We do not think that the defendant can be heard to say that he has lost any right by an amendment of the order, as a proper five months order was duly published in accordance with the statute.

Being of the opinion that the judge should have granted the motion to amend the original order, it follows that the writ will issue as prayed, and without costs.

BROOKE, C. J., and STONE, OSTRANDER, BIRD, MOORE, and STEERE, JJ., concurred.

The late Justice MCALVAY took no part in this decision.

ENGLISH *v.* MICHIGAN CENTRAL RAILROAD CO.

RAILROADS—CARRIERS—NEGLIGENCE—FELLOW SERVANTS—COMPARATIVE NEGLIGENCE.

In an action for the unlawful killing of a railroad employee, caused by a freight car coming in contact with an ice chute which decedent and his co-servants were charged with the duty of placing far enough from the track so that cars would not strike it, the negligence of decedent was of equal degree with the negligence of his fellow employees, whether he actually assisted in placing the chute, or was merely present and saw the work done, and his estate could not recover for his death. See Act No. 104, Pub. Acts 1909.

Error to Van Buren; Des Voignes, J. Submitted

Digitized by Google

April 22, 1915. (Docket No. 111.) Decided September 29, 1915.

Case by Edith English, as administratrix of the estate of Alyn J. English, deceased, against the Michigan Central Railroad Company for the unlawful killing of plaintiff's decedent. Judgment for plaintiff. Defendant brings error. Reversed; new trial denied.

Gore & Harvey (*Henry Russel* and *Frank E. Robson*, of counsel), for appellant.

Fred C. Cogshall and *Thomas J. Cavanaugh*, for appellee.

Defendant company maintains in the city of South Haven, Mich., a large icehouse. This it fills with ice in the winter, and in the summer uses it for the purposes of refrigeration. A side track runs alongside of the icehouse. On the side of the icehouse toward the siding there is erected a platform high enough to permit refrigerator cars to be supplied with ice through the top. This platform is supported at its side nearest the siding by upright posts 8 by 8 inches. Between the posts and the building were placed heavy boards, crossing each other, so as to brace and strengthen the platform. The posts were 8 or 9 feet apart and 4 feet from the siding. In unloading ice from a loaded car into the icehouse, defendant used a movable chute about 18 feet long and 3½ feet wide. It was built of heavy oak material and required two men to handle it. After a car of ice was placed in front of the opening into which it was to be delivered, it was the duty of those engaged in the operation to place one end of the chute in the door of the car and the other in the opening into the icehouse. The ice from the car was then passed along the chute into the house, until the last tier was reached, when the chute was lowered to a "horse" placed on the ground near the car, when the last tier

Digitized by Google

likewise was unloaded. After a car was unloaded, the string of cars would be moved until the next loaded car came opposite the opening, when the whole operation would be repeated. When the entire string was empty, it would be removed, and a number of loaded cars would be placed on the siding.

On the morning of January 30, 1912, plaintiff's decedent, together with two other employees of the defendant company, named Edmonds and Greenman, were engaged in unloading ice at the place described. They had unloaded one car, which was the last one to be unloaded of those upon the siding at the time. As soon as that operation was completed the empty cars were removed from the siding in an easterly direction. It is the claim of the plaintiff, supported by the testimony of Edmonds, that after the last car was unloaded he and his associate, Greenman, who were standing on the ground under the platform and on the east side of the chute, placed the chute upon the "horse" in a position which he thought to be far enough away to escape the side of cars moving upon the track, and that the empty cars were moved out after they had so placed it; that, at the time it was so placed, plaintiff's decedent, English, was standing west of the chute, and between the chute and the upright post supporting the platform; that he was facing the east, the direction from which the loaded cars were to come. There is evidence in the record tending to show that English, plaintiff's decedent, actually helped Edmonds and Greenman to place the chute upon the horse in the position it occupied at the time of the accident. All witnesses of the accident agree that, at the time the loaded cars were backed in, plaintiff's decedent, as well as Edmonds and Greenman, faced the east, the direction from which the train came. Upon the top of the first of the advancing cars stood a brakeman, whose duty it was to see that the track was clear and to signal

Digitized by Google

the engineer. It was the testimony of the brakeman that he had given the "easy" signal to the engineer, and that the train was proceeding about as fast as a man could walk; that he noticed the position of the chute, but believed from his observation that it was placed far enough away from his train to avoid collision. The front end of the car actually missed the end of the chute; but, when the center of the car was reached, the extreme end of the chute was caught, probably by some of the fittings about the door. The impact carried the end of the chute off the "horse" and against plaintiff's decedent, who was standing against, or very near, the post, and so crushed him that he died some nine days thereafter.

Touching the question as to how and by whom the chute was placed, the witness Edmonds testified as follows:

"Mr. Greenman and myself manipulated and placed the ice chute. After the car was unloaded, as I say, we put the chute out so as to clear the car, and an engine came in and picked up the string of empties that we had unloaded that morning and pulled them out. We men stayed there by the chute, on the east side. Mr. Greenman was on the east side. Mr. English was on the west side. There was a post on the west side.
* * *

"*Q.* Did you see the cars pulled there?

"*A.* Noticed them in a general way. We stood there while they pulled that string of empties out. Those cars were moved eastward. No portion of the cars that were pulled out struck this chute. The cars that were to the west of it passed clear. They were box cars all of them.

"*Q.* Now, you and Mr. Greenman remained there in that locality until they returned?

"*A.* Yes, sir.

"*Mr. Gore:* Let him tell what they did, please.

"*Q.* Were you doing anything while they were out for this other load?

Digitized by Google

"*A.* No, sir.

"*Q.* Was this chute that had been placed by you and Greenman changed while they were gone?

"*A.* Not at all.

"*Q.* Did you notice the trainmen returning?

"*A.* We noticed a string of cars coming in."

On cross-examination this witness testified in part as follows:

"I stated that Mr. English was on the west side of the chute at the time he got hurt. I was on the east side. Westgate and Greenman were also on the east side. Mr. English was the only one of the crew that was on the west side, and he was standing between the side of the chute and this upright post, leaning against the post. There were 2½ or 3 feet of space between the side of the chute and the post, a short distance. I had been there in that position 10 or 15 minutes. I should judge; maybe a little longer. Mr. English had been there about the same length of time. We were watching for cars to be backed in; that is, cars loaded with ice. We were standing at the east side of the icehouse. Between these upright posts and the building itself, in the space under the porch between those posts and the building, there are some boards put crosswise to act as braces. One board would start at the upper side of the post and run down near the ground to the building, and the other would cross it in the other direction. I suppose that was to strengthen the porch. We had occasion sometimes, when filling and icing cars, to use the top of that porch. I believe this is what it was there for. I had been waiting, I think, on the east side, and Mr. English on the west side, some 10 or 15 minutes, when the car backed in. That chute is a good, heavy article. It is all a couple of men want to pick up and carry. It is strongly made and well adapted for handling ice. It is a strong, well-made chute. Before the injury to Mr. English, we had used the chute a day we had worked together. The chute was all right, weight and all. * * *

"*Q.* No; I mean after you got down to the last tier, how far would you shove the chute out on the horse before you commenced to unload the last tier?

Digitized by Google

"A. Well, that would all depend on how far in the car it was when you were taking out the top tiers. You would have to shove it out, so the end of the chute would be clear of the car.

"Q. Well, that is what you did?

"A. That is what we did. * * *

"Q. Well, under the way you handled your business there, it was not the particular duty of any two to place the chute, but just those that happened to take hold of it and handle it; that is about the way you worked it, wasn't it?

"A. Why, that was the—why, that was the simple way of doing it.

"Q. That those two men that happened to be convenient to it would handle it?

"A. As a rule.

"Q. That is what I mean. In other words, it was just as much the duty of one man to handle it as it was the other?

"A. Why, certainly; it is three working together and not shirk. In moving that chute from its position in the car, most generally we got out of the car to handle it; jumped down and handled it with our hands, one on each side. Then we got back in the car."

The witness Greenman testified in part as follows:

"Q. You assisted in placing the chute on the horse?

"A. Yes, sir.

"Q. And Mr. English?

"A. Yes, sir. * * * George Edmonds and Mr. English, the deceased, assisted in putting it up there. I think Edmonds was on the east side, the same side I was on. Mr. English was on the west side. * * *

"Q. State now what, if anything, you and Mr. English did before the cars were backed in that morning.

"A. We put the end of the chute on the horse. * * *

"Q. How far north of the top of the horse did you and Mr. English shove the chute?

"A. Well, we supposed we shoved it far enough so it would clear the car.

"Q. State whether you had that in view.

"A. Yes, sir.

Digitized by Google

"*Q.* Was there anything to prevent you from having left the end of the chute a foot from the car?
"*A.* No, sir."

The declaration, filed under Act No. 104, Pub. Acts 1909, charges the defendant with negligence in many respects. No competent evidence, however, was introduced sustaining any of the charges of negligence, except the one that defendant through its agents had negligently placed the chute too near the track upon which they knew loaded cars were about to come in. As to the other alleged elements of negligence, the court, we think, properly charged the jury as follows:

"Now, upon that question, gentlemen, I charge you as a matter of law that it appears by undisputed evidence that the platform, the icehouse, the chute, the wooden horse, the cars, the tracks, and all the instrumentalities used by the defendant in the movement of ice from the switch track into the icehouse, were in a sound state of repair, and that the defendant had performed its duty in that respect."

At the conclusion of the plaintiff's case, defendant moved for a directed verdict upon the following grounds:

"(1) The defendant omitted no duty which it owed the deceased.
"(2) There is no evidence tending to show negligence on the part of the defendant.
"(3) The deceased was clearly guilty of negligence contributing to his injury.
"(4) It is undisputed that the negligence of the plaintiff and his fellow servants was the sole cause of the accident.
"(5) The proximate cause of the injury was the placing of the chute too close to the track; and the defendant is not even connected, by the evidence, with such act.
"(6) It appears by the undisputed evidence that the tools and appliances, the cars and the chute, were in sound condition and without any defects whatever.

Digitized by Google

"(7) The entire work of placing the chute too close to the track was obvious to the plaintiff.

"(8) The defendant could not anticipate that the plaintiff and his fellow servants would place the chute in such dangerous proximity to passing cars as to be dangerous; but, on the other hand, the defendant had a right to presume that the plaintiff and his fellow servants would act with reasonable prudence for their own safety.

"(9) The most that can be claimed under the evidence, for the plaintiff, is that the occurrence was an accident pure and simple."

This motion was denied, and the court submitted the case to the jury upon the single question as to whether the defendant company was guilty of negligence in placing the chute too near the track. Upon this question the court charged the jury as follows:

"In this case, gentlemen, it is the contention of the defendant that all of the eyewitnesses to the accident have been called, to wit, Greenman, Edmonds, and Westgate; and it is the defendant's contention that all of the witnesses, save Edmonds, have testified to the fact that the decedent assisted in placing this chute upon the horse a short time before the cars were pushed down on the siding. Plaintiff, upon the other hand, disputes the fact that the witnesses have so testified. As I have already stated to you, gentlemen, the plaintiff has the burden of showing by a preponderance of the evidence the material allegations necessary for her to recover in this case. If upon this question as to the placing of the chute you should find from the evidence that the decedent, English, did assist in placing the chute upon the horse at the time referred to, then the plaintiff cannot recover in this case, and you need inquire no further, but return a verdict of no cause of action."

Upon the question of negligence he further charged:

"If, upon the other hand, you find that both were guilty of negligence, that is, both were guilty of contributing to this accident to the extent that it was negligence, then you should consider and determine to

Digitized by Google

what extent or to what degree the defendant was negligent, and to what extent and degree the plaintiff was negligent; in other words, the degree of negligence of each, that is, the decedent's as well as the defendant railway company's negligence. If deceased, Alyn J. English, was guilty of greater negligence, that is, a greater degree of negligence than the defendant railway company, then the plaintiff cannot recover. On the other hand, if defendant railway company was guilty of a greater degree of negligence than Alyn J. English, the plaintiff's decedent, then plaintiff would be entitled to recover.

"And, again, gentlemen, if under the testimony, a careful inquiry of the evidence, and a careful analysis, you are unable to determine which of the parties, that is, whether the deceased or the railway company was guilty of the greater degree of negligence, and that it is equal or evenly balanced as to the degree of such negligence, then the plaintiff cannot recover.

"Now, in this connection, in relation to the degree of negligence, if you find that the injury resulting in the death of plaintiff's husband was caused by placing the ice chute too close to the railroad track, and that plaintiff's husband was not responsible for it being placed there, then I charge you that the defendant in this case is liable for the negligence of his coemployee so placing it, and the plaintiff may recover, even if her husband was guilty of negligence, providing that the negligence of her husband was of a lesser degree than the negligence of the defendant railroad company.

"Whether the plaintiff's husband was guilty of contributory negligence, or not, is a question of fact for you to determine. If you find that he was not guilty of contributory negligence, then you will not be concerned with the degrees of negligence; and if you further find that the defendant or its employees or servants were guilty of negligence, and that such negligence of defendant, its employees or servants, resulted in the injury and death of plaintiff's husband, then your verdict should be for the plaintiff.

"Again, if you find that the defendant was negligent, and that such negligence resulted in the injury and death of plaintiff's husband, and you also find that the plaintiff's husband was guilty of negligence

Digitized by Google

which contributed to his injury, then I charge you that the contributory negligence of the husband will not bar a recovery by the plaintiff in this case, provided that the negligence of her husband was of a lesser degree than the negligence of the defendant, its officers, agents, or employees.

"I charge you, under the declaration in this case, you have no right to consider, as bearing upon the alleged negligence of the defendant, the statement of witnesses that there was snow, ice, sawdust, and hay under the porch to the icehouse and in the vicinity of where the men were about to engage in removing ice from the car. If, after considering all the evidence in the case, you find that there is no fault or negligence that can be fairly charged to any one, neither the defendant, nor the deceased, nor other employees, then I charge you that the occurrence was an accident pure and simple, and the defendant is not responsible, and your verdict should be for the defendant.

"In other words, there can be no liability unless there was negligence, and if no one connected with the injury of Mr. English is chargeable with negligence then you should return a verdict for the defendant."

A special question was submitted to the jury as follows:

"Did the deceased, Alyn Jay English, assist in placing the chute where it was at the time of the accident?"

This question was answered in the negative by the jury, and a general verdict rendered in favor of plaintiff.

BROOKE, C. J. (*after stating the facts*). Section 2 of Act No. 104, Pub. Acts 1909, provides that:

"The fact that the employee may have been guilty of contributory negligence shall not bar a recovery: *Provided*, that the negligence of such employee was of a lesser degree than the negligence of such company, its officers, agents or employees."

We are of opinion that it must be held that plaintiff was precluded from recovery under the statute counted

Digitized by Google

upon, as a matter of law. Her decedent, together with Edmonds and Greenman, were charged with the duty of handling and placing the chute in a position of safety. According to all the testimony, he alone was on the west side of the chute, standing in a space from 2½ to 3 feet wide, between the chute and the post. If, as claimed by plaintiff's witness Edmonds, he did not actually assist in placing it in the position it occupied at the time of the injury to him, he at any rate was immediately present during the entire operation. It is entirely apparent, from the testimony above quoted, that Edmonds and Greenman believed they had placed the chute far enough away from the track to escape the oncoming train. It further appears from the record that the brakeman stationed on top of the first oncoming loaded car believed that the chute was so placed. It must be obvious, we think, that plaintiff's decedent shared in this belief, because he occupied a position of extreme danger between the chute and the post in a confined space, where he was certain to be injured in case the end of the chute projected too far toward the track. The chute was placed in position in his immediate presence, even if he did not assist in placing it, and according to the testimony of Edmonds the duty of placing it devolved as much upon him as it did upon Edmonds and Greenman. It therefore is of no importance whether he actually assisted in placing it or not.

If this unfortunate occurrence is not a pure accident, due to an excusable error in judgment on the part of the plaintiff's decedent and his fellow servants, for which no one is responsible, it is then the result of the negligence of Greenman and Edmonds and plaintiff's decedent, and it must be said, under the circumstances disclosed by this record, that the negligence of plaintiff's decedent is not less than that of his fellow servants; the three being equally charged with the per-

Digitized by Google

formance of the duty claimed to have been violated. This being true, the statute forbids recovery.

The judgment is reversed, and there will be no new trial.

KUHN, STONE, OSTRANDER, BIRD, MOORE, and STEERE, JJ., concurred.

The late Justice MCALVAY, to whom this case was assigned, took no part in this decision.

CASE v. BOGART.

1. DEEDS—COMPETENCY—EVIDENCE.
   Testimony that decedent grantor was affected with a disease which caused dizziness and mental weakness and made him forgetful, met by the testimony of numerous friends and acquaintances that he was capable of transacting business though he showed the effects of advanced age, that at the time of executing a deed to his daughter he was 76 years of age, and was treated by complainants as competent until he entered into a marriage that was displeasing to them, *held*, to warrant the decree and finding of the circuit court sustaining the deed of his homestead to his daughter.

2. SPECIFIC PERFORMANCE—EQUITY PLEADING—PRAYER.
   Under a bill of complaint charging that a deed from decedent to his daughter was invalid because of the grantor's mental incompetency, evidence that an agreement was made between the daughter and complainants after the father's decease that if she would release her rights in and to the father's estate they would deliver possession of the farm to her, but that she refused later to carry out the agreement, did not justify granting the relief of specific

Digitized by Google

performance, in the absence of a prayer for such relief in complainants' bill, especially when they did not come into court on that theory, and only demanded the specific enforcement of the arrangement if they failed to establish their claim.

Appeal from Montcalm; Davis, J. Submitted June 22, 1914. (Docket No. 66.) Decided September 29, 1915. Rehearing denied December 22, 1915.

Bill by Seymour J. Case and others against Estella Bogart to set aside a deed. From a decree for defendant, complainants appeal. Affirmed.

N. O. Griswold, for complainants.

Rarden & Rarden and *Kelly S. Searl,* for defendant.

BIRD, J. Chauncey Case resided in the township of Crystal, Montcalm county, for half a century previous to his death, which occurred on May 13, 1911, at the age of 79 years. During this time he acquired the title to farm lands, whose value at the time of his death was about $12,000. He left him surviving one son, Seymour J. Case, a daughter, Emma Johnson, and a granddaughter, Marion Grimm, the complainants herein, and another daughter, Estella M. Bogart, who with her husband are the defendants in the case. In August, 1888, Mr. Case deeded to his son, Seymour J. Case, 50 acres of land, subject to a mortgage lien of $550, and called the consideration therefor $2,000. Three years later, in December, 1901, he made a will in which he gave to his wife the life use of all his property. To his two daughters and one granddaughter he gave the sum of $2,000 each. He recited in the will that he had given the son $2,000, and that he made this bequest in order to make the shares of the other children equal. The will disposed of only about half of his property.

Digitized by Google

In 1907 his wife died, and about a year thereafter he married a second wife, with whom he lived about a year, when some difficulty arose, and they separated. Following this a property settlement was made, and she released all of her interest in and to his property. In November, 1909, he deeded to his daughter Estella M. Bogart, without the knowledge of the other children, the homestead, consisting of 40 acres of land, and left the deed in the hands of the scrivener, with instructions to place it of record and deliver to her after his death. After his death the scrivener did as instructed, and it was then learned by complainants that he had made this conveyance. Trouble arose at once between the complainants and defendants by reason of it, and this bill was filed by complainants to set it aside, claiming that the father was not mentally competent at the date of its execution to dispose of his property.

Upon behalf of both complainants and defendants several witnesses were sworn whose testimony bore upon the father's physical and mental condition at the time the deed was executed. The gist of the complainants' testimony was that beginning with the year 1907, and continuing up to the time of his death, Mr. Case was suffering from the effects of a kidney and bladder difficulty, that he had difficulty about the retention of his urine, and that in consequence thereof, he declined physically and mentally, and that he was troubled with dizziness and had to be assisted in some of his business transactions, and that he became very forgetful.

The witnesses offered in behalf of defendant were people with whom he associated socially and in a business way. His scrivener, banker, doctor, minister, and near neighbors gave evidence, in substance, that in 1909, when the deed was executed, he was showing the effects of advanced age, but so far as they noticed he was normal mentally, and that he transacted his

Digitized by Google

business matters the same as he had done before that time.

The testimony shows very conclusively that at times nearly all of the children had had some trouble with the father; that he had taken offense at the defendants by reason of a lawsuit which he had had with defendant's husband over a settlement growing out of their occupancy of his farm. It was also shown that about the time he was contemplating the second marriage complainants filed a petition in the probate court to have him declared incompetent and a guardian appointed; this was afterwards abandoned, but the old gentleman took offense at this, and after he married the second wife the complainants had very little to do with him until after she left; that during the time he lived with his second wife the daughter, Mrs. Bogart, was on friendly terms with him, and was friendly with him at the time the conveyance in question was made. It does not appear from the testimony that any disinterested person who had an opportunity to know anything about Mr. Case regarded him as incompetent in 1909 to look after his business matters and dispose of his property, and none of the children appears to have been possessed of that notion until they heard that he was contemplating matrimony the second time, and had deeded this 40 acres in question to the defendant Mrs. Bogart.

The testimony fails to convince us that the grantor of the deed was mentally incompetent at the time of its execution. Having reached this conclusion, it is of very little importance by what motives Mr. Case was actuated in giving to Mrs. Bogart more than to other of his children. He may have intended, as appeared from the testimony, to divide his property equally between them, but this resolve may have been altered by the treatment accorded him by his children in his last years in their impatience to get possession

Digitized by Google

of what they were pleased to call *their* share of the property.

As soon as defendant learned that her father was dead, she caused the deed to be placed of record, and attempted to take possession of the homestead. In this she was prevented by the other heirs. The suggestion was finally made that, if she would release all right to her interest in the estate as heir or legatee, they would surrender possession to her. It is said that she agreed to this, but after being let into possession she refused to carry out the agreement. We are asked by complainants to decree a specific performance of this agreement in the event that we find Mr. Case was competent to execute the deed. One of the difficulties in the way of granting this relief is the fact that the bill of complaint does not pray for such relief. The complainants themselves did not come into court relying on the agreement and ask to have it specifically enforced, and do not ask it now, unless they fail on the other branch of their case. The pleadings and position of complainants on the hearing were such that no relief can be consistently granted on that ground.

It is further claimed that the understanding between the father and the scrivener was that the deed should be deposited with the scrivener subject to recall by the father. We do not find this claim sustained by the testimony.

We think the conclusion arrived at by the chancellor was the proper one, and the decree is affirmed, with costs to defendants.

BROOKE, C. J., and KUHN, STONE, OSTRANDER, MOORE, and STEERE, JJ., concurred.

The late Justice MCALVAY took no part in this decision.

Digitized by Google

TAYLOR *v.* BELTON.

1. ASSUMPSIT, ACTION OF—COMMON COUNTS—RESCISSION—FAILURE OF CONSIDERATION—SALES—JUSTICES OF THE PEACE.

Upon a declaration in justice's court containing the common counts in assumpsit, the purchaser of a team of horses was entitled to recover the value of a horse which died; one having proved unsatisfactory and being returned to the seller, plaintiff receiving for it another that subsequently fell ill, and upon his returning it to the vendor, died while in the possession of the latter; plaintiff was entitled to treat the refusal to replace the horse or return the price as a partial failure of consideration, and no special count was required.

2. JUSTICES OF THE PEACE—DECLARATION—REVIEW.

No objection or demurrer to the declaration or to the sufficiency of the common counts having been raised in justice's court, it was not available as a ground for reversal in the circuit or Supreme Court.

3. ASSUMPSIT, ACTION OF—EXCHANGE—SALES.

Nor was it sufficient, to defeat plaintiff's right of recovery, that he exchanged his team as a part of the consideration for the horses, receiving $200 credit for them in the trade, the testimony also showing that the defendant was allowed $150 for each horse.

4. APPEAL AND ERROR—ARGUMENT—DIRECTING VERDICT—DAMAGES.

Upon an affirmative showing in the record that appellants' attorney did not claim the right to argue the question of damages to the jury, no prejudicial error resulted from the action of the trial court in directing a verdict for plaintiff.

Error to Cass; Des Voignes, J. Submitted January 5, 1915. (Docket No. 14.) Decided September 29, 1915.

Assumpsit in justice's court by David A. Taylor against Arthur J. Belton and another for the return of the price paid for a horse. From a judgment for

Digitized by Google

plaintiff, defendants appealed to the circuit court. Judgment for plaintiff on a directed verdict. Defendants bring error. Affirmed.

James H. Kinnane and *W. J. Barnard,* for appellants.

Hendryx & Mosier, for appellee.

BROOKE, C. J. Plaintiff, a farmer, was the owner of a team of light horses. Defendants were dealers in horses. In November, 1913, plaintiff made an arrangement with defendants by the terms of which he turned in his team to defendants at the sum of $200, and purchased from defendants a team for the sum of $300. He states the bargain as follows:

"I went over to the office, and I asked Mr. Belton, I says, 'Well,' I says, 'how are we going to deal?' 'Well,' he says, 'I will tell you what I will do.' He says, 'I will just take your team,' he says, 'allow you $200 for it, and I will sell you my team for $300.' He says, 'My team is worth more than that, but this time of the year,' he says, 'I can get along with your team better than I can with this big team. * * *.' He allowed me $150 for the gray horse and $50 for the sorrel; that made the $200, and he sold me his at $150 apiece."

With reference to one of the horses purchased by plaintiff from defendants, the plaintiff testified:

"Mr. Belton told me, if this horse bothered me any in pulling at the halter, he had a big halter, a big rope, to put on him. I says, 'My land, if he pulls at the halter, I have got a little barn there; he is liable to take it and walk off with it,' He says, 'I don't think he will ever bother you at all.' He says, 'If he does, bring him back.' So I took the horse under those conditions, that if he bothered me I was to bring him back."

Immediately after the consummation of the transaction the plaintiff discovered that one of the horses was balky. After reporting this fact to defendants,

Digitized by Google

he was instructed by defendants to return the horse to them, which he immediately did. Defendants gave him another horse, which he tried for a short time, when it fell ill. Plaintiff reported this fact to the defendants, and was instructed to return this horse to them. This request was complied with by plaintiff, and later the horse so returned died while in defendants' possession. Plaintiff thereafter demanded from defendants either the return of $150, the price he had paid for the horse which he did not get, or that defendants supply him with a horse of that value in lieu thereof. Defendants declined to comply with either demand, and this suit was commenced in justice's court. The action is in assumpsit. A bill of particulars was filed in the following language:

The following is a bill of particulars of plaintiff's demand and for which this action is brought:

Money and value paid by plaintiff to defendants for one team of horses of the value of $300....	$300
Received of defendants one horse of the price and value of $150.....	150
Balance due from defendants to plaintiff the price and value of $150.....	150

A plea of the general issue was interposed by defendants, and the parties went to trial in justice's court, where a jury assessed plaintiff's damages at the sum of $75. Defendants thereupon appealed the case to the circuit court. There they offered no testimony, but contented themselves with objecting to any testimony under the declaration, and to making objections and taking exceptions to the admission of testimony as offered. At the close of the proofs, counsel for defendants made two motions as follows:

"(1) I move the court at this time first to strike out all the testimony in this case, as none of it is material as made by the issue raised by the pleadings in this case."

"(2) I move the court to direct verdict in this case

Digitized by Google

for the defendants for the following reasons: *First,* the plaintiff can only seek to recover on one of three grounds: *First,* for breach of warranty of the horse; *second,* they might rescind the sale and sue for the recovery of the purchase price; and, *third,* for breach of contract. And in either case there must be a special count in the declaration."

Both motions were denied by the court. A verdict was rendered in favor of plaintiff for $150 under direction of the court. In this court, after the citation of many cases as to the sufficiency of the declaration and the impropriety of permitting recovery thereunder, counsel for appellants say:

"We contend, *first,* that no recovery can be had for breach of warranty under a declaration containing only the common counts in assumpsit; that where there is an exchange of property, if a party seeks to recover on the common counts, he can only do so by a rescission of the contract and tender back all of the property he has received, demanding the property he let go; that in no event can the circuit judge direct a verdict for a specific amount, when the damages depend upon the value of the goods exchanged, and where there is no evidence as to the market value of the same; that the case should have been submitted to the jury under proper instructions, leaving the jury to determine the amount of damages from the testimony adduced on the trial; that damages in a case of this kind must be assessed by the jury and not by the court; that the defendants were entitled to a directed verdict on the record as it stands; that an appeal from justice's court is a trial *de novo*; that a valid objection made in the circuit court should be adhered to, regardless of what might have taken place in justice's court; that no unwarranted presumption can be indulged in against the appellants in an appeal from the justice's court, because the return is silent as to objections made during the progress of the trial in said court; that under any view of the case counsel for defendants were entitled to argue the question of damages to the jury, and have the jury assess the same under proper instructions."

The theory upon which the plaintiff attempted to

Digitized by Google

recover was that he had paid to defendants $150, for which he had received no consideration, and that under such circumstances he was entitled to recover on the common counts in assumpsit. This view was accepted by the trial court. We are of opinion that in this the learned trial judge was not in error. *Murphy* v. *McGraw*, 74 Mich. 318 (41 N. W. 917). In any event, we are of opinion that it was the duty of the defendants to have questioned the sufficiency of the pleading in the justice's court, if not satisfied, as was said in *Wilcox* v. *Railroad Co.*, 43 Mich. 584 (5 N. W. 1003):

"When the defendant fails to demur, he tacitly concedes the sufficiency of the declaration, and the court will hold him to this concession, whenever this can be done without probable injustice."

See, also, *Carmer* v. *Hubbard*, 123 Mich. 333 (82 N. W. 64), and *Millspaugh* v. *Schultz*, 180 Mich. 310 (146 N. W. 634).

In the latter case, speaking through Justice MOORE, this court said:

"If the defendants had in the justice's court demurred to the declaration, or objected to the testimony because the requirements of the statute had not been observed, the declaration could at once have been amended. This was not done. * * * The defendants pleaded the general issue, and a trial was had upon the merits. We do not find any reversible error."

We think the fact that plaintiff paid $200 of the purchase price of the team he secured from defendants by turning over to them his team at that figure is of no consequence. He swears that defendants sold him the team he purchased for $300, or $150 each. This testimony is nowhere contradicted in the record. In the absence of contradictory testimony, we are unable to perceive how defendants were prejudiced by the action of the trial court in directing a verdict for

Digitized by Google

the amount which plaintiff testified he had paid for the horse which he did not get.

Counsel for defendants now urges that he should have been permitted to argue the question of damages to the jury. The record affirmatively shows that:

"Neither party requested to be heard in argument to the jury, and neither did the court ask either of the attorneys if they desired to argue to the jury."

We find no reversible error, and the judgment is affirmed.

KUHN, STONE, OSTRANDER, BIRD, MOORE, and STEERE, JJ., concurred.

The late Justice MCALVAY, to whom this case was assigned, took no part in this decision.

PEOPLE v. DIXON.

CRIMINAL LAW — SUNDAY THEATRES — MOVING PICTURE SHOW — ARREST — RIOT — MISDEMEANORS.

The enforcement of section 5912, 2 Comp. Laws, forbidding shows, work, etc., on Sunday, under a penalty of not more than $10, must be by a civil action to collect the penalty: the act of conducting a moving picture show on Sunday does not amount to a misdemeanor and may not be prosecuted by an indictment; nor did the assemblage of the parties owning or operating the theatre and 30 or more persons in such theatre for the respective purposes of conducting and witnessing the exhibition of moving pictures and the refusal of such persons to disperse as commanded by the sheriff amount to a violation of section 11334, 3 Comp. Laws, relating to riots and unlawful as-

Digitized by Google

semblages, so as to bring the violators within the authority for summary arrest provided for by that statute, in the absence of disorder, violence, or breach of the peace.

Exceptions before sentence from Ionia; Davis, J. Submitted April 23, 1915. (Docket No. 125.) Decided September 29, 1915.

Charles Dixon was convicted of operating a moving picture theatre on Sunday in violation of statute. Reversed; respondent discharged.

Herbert C. Hall, Prosecuting Attorney, and *Alfred R. Locke,* Assistant Prosecuting Attorney, for the people.

John Nichol and *R. A. Colwell,* for respondent.

BROOKE, J. Respondent stands convicted under the following information:

"Alfred R. Locke, prosecuting attorney in and for the county of Ionia aforesaid, for and in behalf of the people of the State of Michigan, comes into said court, in the November term thereof, in the year one thousand nine hundred and fourteen, and gives the court here to understand and be informed that one Charles Dixon and Guy Alexander together, with thirty and more persons whose names are to this complainant unknown, late of the city of Belding, in the county of Ionia, and State of Michigan, heretofore, to wit, on the 11th day of October, A. D. 1914, the same being the first day of the week, commonly called Sunday, at a certain theater and show building in the city of Belding at the city of Belding, in the county of Ionia aforesaid, unlawfully did assemble and meet together to disturb the peace and to listen to, to see, and to conduct a certain show and entertainment and public exhibition in said theater and show building, and while so unlawfully assembled and meeting together in violation of law, one Lucius Stoddard, then and there a deputy sheriff of the county of Ionia, did go among them, the said Charles Dixon and Guy Alexander, and

Digitized by Google

the said thirty and more persons, and did then and there command the said Charles Dixon and Guy Alexander and all the said persons therein in said theater and show building assembled, immediately and peaceably to disperse, and that he, the said Charles Dixon, and Guy Alexander, being so commanded, and being then and there unlawfully assembled as aforesaid with the said thirty or more other persons, did wilfully, maliciously, and unlawfully refuse and neglect immediately and peaceably to disperse and leave the said theater and show building and unlawful assembly, and did then and there, contrary to the order and command of the said officer, wilfully, wickedly, and unlawfully refuse to obey the said order, and in defiance of said order and command did remain at said unlawful assembly, and did continue to conduct said show and theater and place of amusement and cause said unlawful assembly to continue, and, being so assembled and gathered together, the said Charles Dixon and said Guy Alexander and the said other persons did then and there unlawfully remain and continue in operating said show and theater, and did continue said unlawful assembly, thereby committing great grievances and a breach of the peace, and thereby disturbing and annoying the good and peaceable people in said city and for a great distance in said city and about the vicinity of said theater and show building, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the people of the State of Michigan."

The facts are not in dispute and are sufficiently disclosed by the information. It was the theory of the people that respondent should be held guilty not only under section 5912, 2 Comp. Laws (2 How. Stat. [2d Ed.] § 5261), which provides:

"No person shall keep open his shop, warehouse, or workhouse, or shall do any manner of labor, business, or work, or be present at any dancing, or at any public diversion, show, or entertainment, or take part in any sport, game, or play on the first day of the week. The foregoing provisions shall not apply to works of necessity and charity, nor to the making of mutual prom-

Digitized by Google

ises of marriage, nor to the solemnization of marriages. And every person so offending shall be punished by fine not exceeding ten dollars for each offense"

—but likewise under section 11334, 3 Comp. Laws (5 How. Stat. [2d Ed.] § 14750), which reads as follows:

"If any persons, to the number of twelve or more, being armed with clubs, or other dangerous weapons, or if any persons, to the number of thirty or more, whether armed or not, shall be unlawfully, riotously, or tumultuously assembled in any city, township, or village, it shall be the duty of the mayor and each of the aldermen of such city, the supervisor of such township, the president and each of the trustees or members of the common council of such village, and of every justice of the peace, living in such city, township or village, and also of the sheriff of the county and his deputies, to go among the persons so assembled, or as near to them as may be with safety, and in the name of the people of this State, to command all the persons so assembled immediately and peaceably to disperse."

Assuming that the running of a moving picture show on Sunday is unlawful under section 5912, *supra*, which we do not determine (*People* v. *Finn*, 57 Misc. Rep. 659 [110 N. Y. Supp. 22]; *People* v. *Hemleb*, 127 App. Div. 356 [111 N. Y. Supp. 690]; *William Fox Amusement Co.* v. *McClellan*, 62 Misc. Rep. 100 [114 N. Y. Supp. 594]; *Edwards* v. *McClelland*, 118 N. Y. Supp. 181; *State* v. *Chamberlain*, 112 Minn. 52 [127 N. W. 444, 30 L. R. A. (N. S.) 335, 21 Am. & Eng. Ann. Cas. 679]; *State* v. *Penny*, 42 Mont. 118 [111 Pac. 727, 31 L. R. A. (N. S.) 1155]; and *Rex* v. *Charron*, 15 Can. Crim. Cas. 241), we are of opinion that the judgment in the case at bar must be reversed, in harmony with the reasoning of Justice HOOKER in *Yerkes* v. *Smith*, 157 Mich. 557 (122 N. W. 223). We there said:

"The playing of baseball on Sunday is an act prohibited and punishable by law; the penalty being a fine of $10. It does not amount to a misdemeanor and cannot be prosecuted by indictment; the only remedy being

Digitized by Google

a civil action. See 3 Comp. Laws, § 9797 *et seq.; Pettinger* v. *People,* 20 Mich. 336. The action sought to be enforced by this proceeding is primarily the prevention of a game of baseball, advertised for August 30th last, and of games that are said to have been contemplated on Sundays of later dates. We suppose that relator expects such games to be prevented by arrest of those engaged in them. The law has prescribed another method for preventing infractions of this law, viz., a penalty to be collected through judicial proceedings; and a summary arrest, even after a violation of the law, is not contemplated, and is not authorized by law, as a means of preventing the violation of this statute. 2 Comp. Laws, § 5912. See authorities above cited.

"We understand that counsel does not contend otherwise, and that he rests his right to a writ upon the claim that under 3 Comp. Laws, § 11334, and succeeding sections, a game of baseball played in the presence of 30 or more persons is *per se,* and necessarily, a breach of the peace, and an assemblage of persons to the number of 30 or more, for the purpose of playing and witnessing such a game in Detroit on Sunday, is such an 'unlawful, tumultuous, or riotous assemblage' as to make it the duty of this respondent to be present in person, or by policemen under his control, and prevent the game and the alleged consequent breach of the peace, by commanding said assemblage to immediately and peaceably disperse, enforcing such command by the arrest of all such persons as may fail to obey. Before the respondent could be required to arrest any one there must have been either a breach of the peace already committed or a failure to comply with a lawful order to disperse. Taking the answer as true, we must assume a willingness on the part of this respondent to cause warrants to issue for the arrest of all persons violating section 5912, and, acting through his subordinates, summarily to arrest all persons who should be guilty of a breach of the peace, but that he refused to assume that all baseball games played on Sunday required his personal attendance or would justify a command by him to disperse and subsequent arrest under the statute cited, if such command should not be obeyed.

Digitized by Google

"We have said that the mere playing of a game of baseball upon Sunday is not of itself and necessarily a breach of the peace, justifying arrest and indictment. In a sense, a game of baseball on Sunday may often be a breach of the peace, perhaps usually is, but it cannot be said that it is necessarily so, and before a summary arrest can be made for a breach of the peace, not only must overt acts be committed in the presence of the officer, but they must be violent and dangerous acts of some sort. * * *

"It is clear that a mere assembling of persons to play and witness any Sunday game is not sufficient, without overt acts of violence or disorder, to authorize an officer to make a summary arrest. This being so, relator's claims must be left to rest upon the statute (section 11334) which has been held to be applicable, where a game of baseball on Sunday in a public place was attended by several hundred assembled, unlawfully and tumultuously, to witness it. *Scougale* v. *Sweet,* 124 Mich. 315 (82 N. W. 1061). Before an arrest can be required under this statute, there must be:

"(1) A condition of things justifying a command to disperse by the proper officer designated by law.

"(2) Disobedience of the command.

"This statute is apparently based upon the common-law duty of sheriffs and others to read the riot act and command a dispersal of persons at a time of riot. This statute may perhaps be said to have enlarged the common-law rule. It has certainly made it an offense to disobey a lawful command. But before one can be convicted of such an offense, there must have been:

"(1) An occasion for such a command;

"(2) the command must have been made by one of the statutory officers;

"(3) the command must have been disobeyed."

While the foregoing statement was not necessary to the decision in the case there considered, we are of opinion that it correctly states the law applicable to the instant case, and that the remedy against the respondent, in the absence of any overt acts of violence or disorder, must be confined to that provided under section 5912, 2 Comp. Laws.

Digitized by Google

The judgment is reversed, and the respondents are discharged.

KUHN, STONE, OSTRANDER, BIRD, and STEERE, JJ., concurred. MOORE, J., did not sit.

The late Justice MCALVAY took no part in this decision.

HOOVER v. DETROIT, GRAND HAVEN & MILWAUKEE RAILWAY CO.

1. NEW TRIAL—APPEAL AND ERROR—RAILROADS—NEWLY DISCOVERED EVIDENCE.

   Where plaintiff's motion for a new trial, in an action for the negligent killing of a child who wandered onto a railroad track at or about the crossing of an alley, and within the limits of defendant's yard, presented the newly found testimony of a person living near the scene of the accident who saw decedent and another infant slowly approaching the tracks and last observed them when they were several feet south of the same, and a minute or less afterwards heard the sound of the train stopping, as bearing on the time within which the engineer might have seen the infants if he had been on the lookout, and where her testimony was merely cumulative, with other proofs offered at the trial on the same point, the court did not err in refusing to grant the application, as the evidence might have been obtained, with the exercise of reasonable diligence, for the first trial; also because the testimony was cumulative and not likely to change the result, which was a judgment and verdict for defendant by direction of the court.

2. RAILROADS — NEGLIGENCE — RIGHT OF WAY — YARDS — FENCES — TRESPASSERS.

   In this State the rule is well settled that railroads are not

Digitized by Google

required to fence their yard limits, nor is failure so to do evidence of negligence.

3. SAME—ALLEYS—CROSSINGS—PRESUMPTIONS.

It will not be presumed, from an implied license to cross a railroad track at an alley, that helpless infants, too young to understand danger, will be suffered by those that are responsible for them to wander along or upon the railroad right of way upon which numerous trains are accustomed to pass.

4. INFANTS—CONTRIBUTORY NEGLIGENCE—TRESPASS.

Infants, too young to be conscious of the nature of their acts, or danger therefrom, are not chargeable with contributory negligence or with intentional trespass such as to bar recovery for negligent or reckless conduct of others.

5. RAILROADS—INFANTS—NEGLIGENCE—DUE CARE.

Where there is reason to anticipate that persons or children may be met with on the tracks, especially in cities or towns, trains cannot be operated on the assumption that the track will be clear, and need not be watched, but a proper lookout must be maintained with that degree of care which a person of ordinary caution, having in mind both the safety of the train with its passengers and persons ahead likely to be injured by it, would commonly exercise under like circumstances, according to the probability of danger at the portion of the track being traversed.

6. SAME.

Those who have no relations with infants, such as parent and child, teacher and pupil, or master and apprentice, from which special duties or obligations arise, are not liable for acts done in carrying on the business in which they may be engaged beyond the liability that would attach to negligence towards other classes of persons, not guilty of contributory negligence.

7. SAME—EVIDENCE.

Where two infants were struck by defendant's passenger train, in a city where an alley crossed the right of way, and the evidence showed that no person was in sight when the engine turned the nearest curve to the place of the accident, and the engineer testified that he was watching ahead, and that he made every effort to stop when he did discover them, about 150 or 200 feet ahead of the train,

Digitized by Google

which was running 18 or 20 miles an hour, and it appeared that it could not be checked by using the emergency brake in less than 300 feet or upwards, that the defendant had often warned trespassers off its right of way at this point, had at one time fenced it, being within the yards, and had not acquiesced in the use of the tracks by the public, the trial court did not err in directing a verdict for the defendant railroad.

8. SAME.

And upon proofs tending to show that the infants went upon the track not over 200 feet in advance of the train, too near for it to be stopped without hitting them, that the engineer could not have stopped his train in time even if he had seen them sooner, evidence of actionable or culpable negligence was insufficient to charge defendant with liability for the death of one of the children.

Error to Kent; McDonald, J. Submitted April 8, 1915. (Docket No. 25.) Decided September 29, 1915.

Case by Harry H. Hoover, as administrator of the estate of George L. Hoover, deceased, against the Detroit, Grand Haven & Milwaukee Railway Company for the unlawful killing of plaintiff's intestate. Judgment for defendant on a directed verdict. Plaintiff brings error. Affirmed.

Lombard, Hext & Washburn, for appellant.

Harrison Geer (*W. K. Williams,* of counsel), for appellee.

STEERE, J. Plaintiff brought this action as administrator of his infant son, George L. Hoover, who, on June 18, 1912, wandered from his home upon defendant's track and was struck by a passing train, receiving injuries of which he died the following day. He was then 25 months of age.

The accident occurred about a mile east of the Plainfield Avenue station, in the city of Grand Rapids, near the east line of an alley which runs north and south

Digitized by Google

just west of and parallel with Benson street, upon which his parents resided, in the sixth house south of the track, on the west side. On leaving the station the railroad track bears southeasterly, curving nearly to the east, where it passes under what is known as College avenue bridge, and from there runs straight to and beyond the place of the accident, which is 936 feet east from the bridge. On the north side of this portion of the track lies Highland Park, a public park of the city. Grand avenue crosses the railroad upwards of 1,400 feet east of College avenue. No streets cross the track between the two. Benson street extends south from the railroad right of way 508 feet west of Grand avenue. Two other north and south streets, Union and Brainard, also extend south from the right of way between Benson and the bridge. The open park extends along the north side of the railroad westerly from Grand avenue to beyond the north end of the alley mentioned, nearly opposite the end of which deceased was struck by the regular east-bound passenger train of defendant which had left the station at 4:52 p. m. At that point the track passes through a cut with banks about 25 feet high on each side; the roadbed being raised by grading so that the rails and ties are about a foot above the general level.

It is conclusively shown, and undisputed, that when the train reached the College avenue bridge, and until it had proceeded a considerable distance east of there, the track was clear. Deceased was struck by the train just as, or after, he came upon the track from the side, accompanied by another small child of about the same age. The fireman was down on the deck of the engine at his fires as the train approached this point. The engineer was in his seat on the right side of the cab, watching the track ahead through the front window provided for that purpose. His view along the line of the track from the bridge beyond the place of the

Digitized by Google

accident was clear. He testified that he was on time, that just before he went under the bridge he sounded a signal, that the engine bell was ringing, and he was in his seat maintaining a lookout from the bridge to the place of the accident, that, if he was not looking straight ahead all the time, "I would not be an instant, it would not be but a second or two, to glance over my cab to see what was going on." Of the accident he testifies that the first thing which attracted his attention was when he "saw the children coming on the track and when they were crossing the track, from 150 to 200 feet in front of the engine." He also said:

"One was on the outside of the rail and one inside the rail. * * * The very moment I first saw them they were right on the middle of the track. * * * The second I saw them I slapped the brakes in emergency and throwed my engine off. * * * I could not have done anything more than I did to stop the train."

The train consisted of the engine, a baggage car, a mail and express car combined, and two passenger coaches. It was 220 feet long, running at 18 or 20 miles an hour, and could be stopped by using the emergency in from 300 to 400 feet. It ran a distance of from 40 to 100 feet after striking the children. The pilot threw them from the track, not seriously hurting the other child, but fatally injuring deceased. That the engineer acted promptly after seeing the children, did everything possible to meet the emergency, and made a good stop, is not seriously questioned. The complaint is that he should have seen them sooner.

At the close of the testimony a motion for a directed verdict in favor of defendant was granted, for the reason that no *prima facie* case of actionable negligence on the part of defendant was shown; that plaintiff's contention that the engineer could and should have seen the children's perilous condition sooner was

Digitized by Google

only based upon and supported by certain claimed inferences from measurements, against positive testimony of eyewitnesses to the accident, and a verdict of negligence on the part of the engineer, if returned, would be so against the weight of evidence that it would be the duty of the court to set it aside; and for the further reason that it was not the duty of defendant to watch for trespassers within its yard limits. It was shown that defendant's yard limits, as established and used, extended beyond the place of accident, and the right of way was not then fenced at that point.

A motion by plaintiff for a new trial was denied. Aside from alleged errors in rulings during the trial and in directing a verdict, the ground of newly discovered evidence was also urged, based upon an affidavit of a woman living near by to the effect that from her window she saw the children upon the alley slowly approaching the track, and last noticed them when they were several feet south of a cinder path south of the track; that between a half minute and one minute later she heard the sound of brakes stopping the train, and, looking again, saw the two children had been thrown to the south side of the track, lying on the ground on or near the cinder path, and the engine stopped some distance beyond. Her house was situated 25 feet above the level of the track, and she also testified as to both her opportunities of observation and those of the engineer on a train approaching from the west. On denying this motion the court said:

"The newly discovered evidence as shown by the affidavit of Mrs. Davis would not change the result or add anything to plaintiff's case."

This witness was a near neighbor of plaintiff, and continued to live there until the time of the trial. With reasonable diligence her evidence could have been discovered and then produced. She did not see the accident or the children upon the track. Her testimony

Digitized by Google

was in its nature cumulative upon plaintiff's contention that the engineer should have seen them sooner, and, as bearing upon whether a verdict should have been directed, not such as to call for a different ruling. The showing upon the claim of newly discovered evidence was not such as to demand a new trial. *Raymond* v. *Day*, 111 Mich. 443 (69 N. W. 832); *Canfield* v. *City of Jackson*, 112 Mich. 120 (70 N. W. 444).

Plaintiff's counsel group their assignments of error, for argument, into the following propositions, interrogatively stated:

"(1) Was there any obligation of care on the part of defendant in keeping a lookout for children on the track at the place deceased was injured?

"(2) Was there error in excluding evidence that the maintaining of fences along the line of the right of way at this point would not interfere with railroad operations?

"(3) Was there on the trial or in the affidavit supporting the motion for a new trial evidence of negligence of the engineer in failing to keep a proper lookout in approaching the place where the injury occurred?"

The first and third queries blend in argument and together involve the important and controlling question of whether a verdict for defendant was rightly directed.

As to the second, we do not discover from the record that defendant contends fencing along the right of way would seriously interfere with railroad operations. On the contrary, it was shown that some years before the accident defendant had built fences along both sides of the right of way past the park and erected warning notices to prevent persons from trespassing upon the tracks in crossing to and from the park, but that these were repeatedly broken down and ignored by those who persisted in crossing there, until they had virtually disappeared, and the section foreman

Digitized by Google

gave up trying to maintain them, though he continued to warn away trespassers and drive away children whenever he saw them upon the right of way. It was shown, and not disputed, that nevertheless both adults and children did frequently cross the tracks in that locality as a convenient way to the park, and in doing so had made paths. There is no proof of affirmative permission or invitation, but it is shown that those found crossing were frequently warned away, and defendant contends it was unable to prevent this trespassing unless it constantly stationed guards there, which it was under no obligation to do.

It is well settled that railroads are not required to fence their yard limits, and a failure to do so is not evidence of negligence. *Rabidon* v. *Railway Co.*, 115 Mich. 390 (73 N. W. 386, 39 L. R. A. 405); *Burtram* v. *Railroad Co.*, 148 Mich. 166 (111 N. W. 749). The circumstances of this case show no express or implied invitation from defendant to cross its tracks at that point. The most that can be claimed is lack of constant vigilance to prevent, and that it suffered or tolerated such use.

"The status of a trespasser in going upon railroad tracks at a place other than a public crossing, without express or implied permission, will not ordinarily be affected by the fact that he or others of the public have been accustomed to walk upon or cross the tracks at that place, especially where repeated protests and warning against such use have been given. Nor, as a general rule, is the mere fact that the railroad company does not object or passively acquiesces in such custom sufficient to constitute such a person more than a trespasser, or at most a mere licensee." 33 Cyc. p. 758.

The question of whether persons of accountability crossing the track at that point were in law trespassers or mere licensees by implication is, however, of little importance here, for it would be strangely

Digitized by Google

incongruous to give significance as the acts of a licensee to the conduct of a child *non sui juris*, possessing no more understanding of boundary lines and property rights than a stray animal and less able to understand and protect itself from danger.

There can be no presumption from an implied license to the public to cross private property that helpless infants, too young to understand danger, will be permitted by those responsible for them to wander, when regular trains are passing, unattended along or upon a railroad track; and, on the other hand, the law recognizes that such infants are unaccountable, because unconscious of the nature of their acts, with no appreciation of attending danger to themselves or others, and therefore cannot be charged with contributory negligence nor held as wilful trespassers to an extent which precludes redress for injury resulting from the reckless or negligent acts of others. *Battishill* v. *Humphreys*, 64 Mich. 494 (31 N. W. 894); *Huggett* v. *Erb*, 182 Mich. 524 (148 N. W. 805). The latter case lays down no new doctrine and changes no previous rule, but, as applied to the case then under consideration, reiterates and points out the distinction, relating to trespass, involving danger of injury, between infants *non sui juris* and adults or those of sufficient age to realize the nature of their conduct, care for themselves, and be accountable for their acts. In that case two small children in the city of Alma were playing along and walking down the track ahead of an approaching train, which struck and seriously injured one of them, unnoticed by the engineer or fireman, who first learned of the accident when they arrived at the next station. These children, not simply crossing the track, but walking along it, were not seen by the engineer at all. Although plaintiff's evidence tended to show that the children, seen by others who sought from some distance to signal the train and reach them ahead of it,

Digitized by Google

were upon the track in plain sight of those upon the engine long enough to have been seen by them in abundant time to easily stop and avoid the accident had any lookout been maintained. It was there urged that, irrespective of such evidence, a verdict should be directed for defendant because the children were, in fact, not seen by the engineer or fireman and were trespassers upon the right of way, to whom defendant owed no duty but to avoid injuring them if and when seen, apparently in disregard of the duty to keep a reasonably vigilant lookout according to environments and of the distinction there discussed under which the law does not necessarily bar such infants as accountable trespassers from redress for personal injuries resulting through the negligence of others. The gist of the distinction is that such infant must be recognized as legally unaccountable and itself free from blame.

Back of that lies the rule that at places where there is reason to anticipate that persons, including children, may be upon the track, as in cities and towns, the train cannot be operated upon the presumption that the track is clear and need not be watched, but a proper lookout must be maintained with that degree of care which a person of ordinary prudence and caution, having in mind both the safety of the train with its passengers and persons ahead likely to be injured by it, would commonly exercise under like circumstances, according to the probability of danger at the portion of the track being traversed.

The duty of strangers to children was early discussed, and the rule clearly stated, in *Hargreaves* v. *Deacon*, 25 Mich. 1, where it is said:

"We feel, usually, more indignation at wrongs done to children than at wrongs done to others. But the law has not usually given them civil remedies on any such basis. Nor does it usually, if ever, impose any duties on strangers towards them, resting entirely on the fact that they are children. Those who have any

Digitized by Google

special dealings with them, as parents, teachers, and employers, incur obligations appropriate to their relations, and differing from those incurred towards others in proportion to the necessity of care and protection and the risk of injury. But those who have no such relations with them are not liable for negligence in carrying on their own business, beyond what would be their liability to others, as well as children, who are equally free from blame."

In the *Huggett Case* and *Green* v. *Railway Co.*, 110 Mich. 648 (68 N. W. 988), cited by plaintiff as analogous in facts and supporting his contentions, being cases in which children of near the same age as deceased wandered upon tracks and were struck by passing trains, the controlling reason for holding them cases for a jury was that the records contained testimony showing no lookout was maintained; that the children, plainly in sight upon the track, were not seen at all by any of the train crew before the accident, and no attempt was made to avoid injuring them, while here a watch along the track was kept by the engineer, who did see the children and made every effort to avoid injuring them as soon as they were seen. The only question here is whether there is any competent testimony in the case tending to show negligence in his not being more vigilant and prompt. The same distinction appears in *Tutt* v. *Railway Co.*, 104 Fed. 741 (44 C. C. A. 320), resembling in certain particulars this case, and relied upon by plaintiff. It was there held under plaintiff's testimony that the question of implied license was an issue for the jury; that "persons availing themselves of such implied license would not be trespassers, and the railroad company would come under a duty in respect to such licensees to exercise reasonable care in movement of its trains at points where it was bound to anticipate their presence"; and that it might properly be left to the jury to determine whether such management was negligent

Digitized by Google

in a case where plaintiff's testimony showed that the 14 approaching cars were being pushed along the track with no brakeman upon them, that no warnings were given, and that no means were taken to avoid collision with persons who might be expected to be found upon the track; in other words, it was a case for the jury, because there was evidence that no lookout was maintained and no warning was given of the approaching train. In the instant case it is conclusively shown that these things were done. This was a regular passenger train, leaving the city on time, at a lawful rate of speed, properly equipped, the engineer in his seat where his duties assigned him, in charge of and running his engine, maintaining a lookout along the track ahead. A warning signal was sounded as the train came around the curve at the bridge, and the bell was ringing.

Conceding this was a place where the presence of persons on the track was to be anticipated, no one was there when the train came in sight around the curve at the bridge. No person saw these children upon the track until the train was close to them, and the evidence of those who saw them is that they were not. The engineer, whose duty it was to see, and who testifies he was watching, estimates the distance at which they came upon the track ahead of the train at 150 to 200 feet. Welch, the foreman of that section, who came in from the east with his hand-car and pulled it off the track at Grand avenue as he saw the train coming around the curve at the bridge, testifies:

"When I first saw the train up beyond the bridge I did not see any children. I looked on the track, and did not see a soul on the track. * * * I could see between me and the train. There was nobody on the track. Then I turned immediately to my car and put it off. I did not see where these children came from. When I first saw them the train was just hitting them."

Digitized by Google

After putting his car off his attention was directed to some sewer work passing under the track, and he did not look towards the train again until he heard some one shout, and turned just in time to see the accident.

The two other witnesses who saw the accident were a Mr. Boyes, a contractor who was putting in a sewer at Grand avenue which ran under the track, and his foreman, named Rens. When the train approached Boyes was some 60 feet away from the track, and from where he then stood some bushes obscured his view of the approaching train. His men were working at the sewer where it passed under the track, and he was watching for the train to notify them, if necessary. He testified in part:

"I had made several observations to the west to see about the train coming or hearing it. I had not at any time seen these children on the track, except immediately before the collision took place. When I first saw the children on the track I started to run and holler. I would not go over 8 or 10 feet until I could see College avenue, just to get through the evergreen trees. I saw the train just after I had made a few steps. It would be pretty hard for me to tell how close to the children the train was when I started to run, but it could not have been a great ways because it all happened in a few seconds. * * * Well, I don't think the engine would be more than 200 feet from the children when I saw them."

Rens stood on the track over the sewer and notified the men when he heard the train coming. He states he looked up to see the train, and saw no one on or near the track, heard the whistle and watched the train approach, then noticed some one go up the small embankment, and, as they got high enough so he could see, discovered it was two little children. He estimated the engine "would be probably 150 feet west of them when these little children stepped upon the track," and that it ran about 60 feet after it struck them. He also states:

Digitized by Google

"The children were just about at the ties at the time I first discovered them. * * * I saw this train all of the time after it left the bridge approximately until it struck the children. I did not see the children until they were stepping on these ties."

While it is contended that modifying statements of these witnesses as to means of observation, seconds of time, and distances in feet raise opportunity for inference that the engineer could have seen them sooner and could have stopped quicker, we conclude from a careful reading of this record that there is no testimony which tends to negative their testimony that these children suddenly appeared upon the track and in view when the engine was within not over 200 feet of them and too near for the train to be stopped before reaching them; that this accident resulted from a sudden and unanticipated act of the child itself, was not to be anticipated, could not be foreseen, and therefore in the reasonable conduct of defendant's business could not be guarded against. In such case there is no liability. *Coessens* v. *Rapid Railway*, 136 Mich. 481 (99 N. W. 751).

The judgment is affirmed.

BROOKE, C. J., and KUHN, STONE, OSTRANDER, BIRD, and MOORE, JJ., concurred.

The late Justice MCALVAY took no part in this decision.

Digitized by Google

WEISSERT v. FULLER.

1. BOUNDARIES—ADEQUATE REMEDY AT LAW—EQUITY—QUIETING TITLE.

While it is recognized that courts of equity may pass upon or locate boundary lines as an incident of issues properly within chancery jurisdiction, the rule is well settled that they have no inherent and independent jurisdiction to determine the true location of disputed boundaries.

2. SAME—BILL OF COMPLAINT.

In a suit to quiet title to a strip of land, 2½ feet in width, lying between complainant's lot and an adjoining parcel, the bill which asked for no distinctively equitable relief and claimed no land except that to which she was entitled under her conveyance, was open to the objection that complainant had an adequate remedy at law, and the averments of the bill as to possession in complainant having been denied, the trial court properly dismissed the proceeding.

Appeal from Barry; Davis, J., presiding. Submitted April 22, 1915. (Docket No. 62.) Decided September 29, 1915.

Bill by Della Weissert against Roy C. Fuller and Didama Fuller to quiet title to certain real property. From a decree for defendants, complainant appeals. Affirmed.

Thomas Sullivan, for complainant.

Lee H. Pryor and *Colgrove & Potter*, for defendants.

STEERE, J. Complainant is owner by record title of the north halves of two adjacent lots, numbered 965 and 966, of the original plat of the city of Hastings, Mich. Defendant Roy C. Fuller owns of record the south half of said lots; defendant Didama Fuller being

Digitized by Google

his wife. This litigation is over the true location of the dividing line between their holdings. The two lots are, according to the plat, each 4 by 8 rods, being 66 feet wide east and west, and 132 feet long north and south; the north end of each fronting on the south side of Walnut street, which extends east and west. Lot 965 joins 966 on the west, and is a corner lot at the southeast corner of Walnut and Jefferson streets, extending its entire length of 132 feet along the east line of the latter street, which runs north and south.

Long before the parties to this suit acquired their titles, the two lots had been divided east and west; one party owning and occupying the two north halves and another the south halves. This gave each a frontage of 66 feet on Jefferson street, with a depth of 132 feet, the north halves constituting a corner lot extending 132 feet along the south line of Walnut street. By their record titles the present owners have lots of the same size and frontage on Jefferson street, and both testify that all they ask or claim is the 66 feet on Jefferson street which their deeds entitle them to; but each contends that the other is claiming 2½ feet more than he or she is entitled to, and each claims possession of the 2½ feet in dispute.

The lots thus rearranged long ago have since been separately owned and occupied by distinct owners, who so far as this record discloses dwelt in harmony prior to this contention. After the present owners purchased, complainant moved the old house, located upon her lot, composed of the north halves of the original lots 965 and 966, farther south and rebuilt it. Defendants made no objection at the time, but subsequently had the property surveyed, with the usual accompaniment of setting stakes. They resided upon their property. Complainant, who lived in another part of the city, rented hers and held vicarious possession by tenants. The debated 2½ feet is part of the

Digitized by Google

yard, or yards, between the two houses, apparently in lawn, as it is indicated that the complacency with which certain of complainant's tenants suffer defendants to run their lawn mower over this strip, and even beyond, may have some bearing upon the respective claims as to who is in possession. The present diversity of views as to the true location of the dividing line between the north and south halves of these lots appears to have first become acute when complainant learned that defendant had extended a new cement walk which he built along the east side of Jefferson street in front of his place 2½ feet farther north than she claimed the line between them ran. Following this, at a time defendant and his family were away assisting in celebration of the national holiday, she constructed a fence, called by witnesses "the Fourth of July fence," on what she contends is the true line, as long ago agreed upon by former owners and where they had formerly built and maintained a line fence for many years. Beyond a temporary physical declaration of ownership and possession the so-called Fourth of July fence is of scant materiality, as it soon appears to have become obscure, just how is not clearly shown, though Mrs. Fuller in her testimony suggests:

"The boys that were there Hallowe'en night might have loosened the posts, and some of it has been broken down since."

On August 13, 1913, complainant filed this bill to quiet title to the 2½-foot strip in dispute, alleging ownership both by record title and long-continued peaceable possession from far beyond the statutory period up to and at the time of commencing suit, charging that—

"said Roy C. Fuller now claims and pretends that under and by virtue of his deed he is the owner of 2½ feet or thereabouts of the land lying north of the east and west boundary line dividing the north half of said

Digitized by Google

lots from the south half thereof, and that the boundary line as established, agreed upon, and recognized by your oratrix and her predecessors in title, for a period of 50 years or thereabouts, is not the true or correct boundary line dividing the north half of lots No. 965 and No. 966 from the south half thereof, but that said boundary line should be 2½ feet or thereabouts farther north than it now is, and now claims and pretends that your oratrix and her predecessors have never acquired title to said premises by deeds of conveyances in your oratrix's chain of title or by adverse possession or otherwise."

The relief asked for in said bill is that the court decree as follows:

"That the claim of the said Roy C. Fuller and Didama Fuller to the land, or any part thereof, where said east and west division fence has been located, and north therefrom is null and void as against your oratrix; and that the said Roy C. Fuller and Didama Fuller have no right, title, or interest in said lands or any part thereof; and that the said Roy C. Fuller and Didama Fuller may be decreed to have no right, title or interest whatever in and to said lands or any part thereof; and that your oratrix may have leave to cause such decree to be recorded in the office of the register of deeds for Barry county, Mich."

Defendants filed an answer in the nature of a cross-bill, with a demurrer clause, denying all material allegations in complainant's bill, alleging actual occupancy, control, and possession in themselves of the disputed strip, which was conveyed to them by their grantor, charging that complainant had intruded upon an alley or strip 8 feet 3 inches wide owned by them out of lot 967 running along the east side of her property, asking for relief in that particular and—

"that the boundary line of said premises be fixed and established upon the true line between the south half of lots 965 and 966 and the north half of said lots."

Upon the hearing testimony was introduced, much of it sharply in conflict, upon the question of posses-

Digitized by Google

sion at time of filing the bill, location of the true line according to surveys and measurements, and adverse possession to a defined and agreed line for the statutory period. The record contains no opinion of the trial court, beyond that disclosed by the decree, which sustained defendants' demurrer clause in their answer and dismissed the bill "without prejudice to complainant to begin an action at law."

A careful examination of the pleadings, proofs, and other proceedings clearly discloses that the primary and controlling issue is the true location of the dividing line between these adjoining properties. Neither party makes any claim beyond that involved in a boundary dispute. When that question is finally determined, the respective rights of the parties are settled. The bill is not framed to ask injunctive relief, but only for a quieted title to the disputed strip, based on an adjudication of where the dividing line is located. Complainant testifies:

"I just claim what the deed calls for, 66 feet from the monument, and I think that monument is at the northwest corner."

Defendant Fuller, when asked if he claimed more than his deed called for, said:

"That is what I am after, is my 66 feet. * * * I do not claim more than 66 feet, and would be glad to have it."

But complainant's counsel urge that this is not a dispute over a boundary line and say in their brief:

"The line has been well established and acquiesced in from 1883 until 1913, a period of 30 years. The complainant and her grantors have been in possession for a period of 50 years and upwards, and were in possession up until the filing of the bill of complaint in this case. The defendants now claim title to 2½ feet of complainant's land, of which she is and was in possession at the time the bill was filed. She had no

Digitized by Google

right of action against defendants, except in a suit to quiet title."

In such case she would have an action against them for trespass if they interfered with her possession, but the stated facts upon which the legal proposition is founded are denied by defendants, both in their pleadings and proofs. While it is recognized that courts of equity may pass upon a disputed boundary when incidental to and connected with other issues properly coming under some recognized head of equity jurisprudence, the rule is well settled that equity courts have no inherent and independent jurisdiction to determine the true location of disputed boundaries. *Wykes* v. *Ringleberg,* 49 Mich. 567 (14 N. W. 498); *Kilgannon* v. *Jenkinson,* 51 Mich. 240 (16 N. W. 390); *Bresler* v. *Pitts,* 58 Mich. 347 (25 N. W. 311); *Andries* v. *Railway Co.,* 105 Mich. 557 (63 N. W. 526); *Dolan* v. *Smith,* 147 Mich. 276 (110 N. W. 932). Ejectment and trespass are the customary, and ordinarily adequate, remedies at law by which disputed boundaries are settled.

The merits of this controversy, by which the rights of these parties must finally be determined, are not properly before the court in this suit; but it may be stated in further substantiation of the trial court, in dismissing complainant's bill, that she has not satisfactorily shown actual and exclusive possession in herself of the disputed strip at the time of filing her bill. It is indicated that the vicarious possession which she claimed through tenants was not of particular interest to them, while defendants by their pleadings and proofs have positively and unequivocally insisted that they were and are in full, open, and complete possession, which gives her an adequate remedy at law by ejectment. Her grievance implies legal remedies, and, as her bill is framed, is devoid of elements conferring jurisdiction upon a court of equity.

Digitized by Google

The decree of the court below, dismissing complainant's bill without prejudice to proceedings on the law side of the court, is sustained, with costs to defendants.

BROOKE, C. J., and KUHN, STONE, OSTRANDER, BIRD, and MOORE, JJ., concurred.

The late Justice MCALVAY took no part in this decision.

CASTERTON v. PLOTKIN.

1. DEEDS—RESTRICTIONS—COVENANTS—CONSTRUCTION.
   A conveyance of a city lot with the restriction that it should be used for residence purposes only, limiting the height of buildings to two stories and fixing the cost, distance from street, etc., did not exclude the erection of an apartment house; and no further or different limitations to those expressed in the deed might be implied.

2. SAME—INTERPRETATION—BUILDING RESTRICTIONS.
   Such restrictions are construed strictly against the grantor and those claiming to enforce them, all doubts being resolved in favor of the free use of the property.

3. SAME—RESIDENCE PURPOSES—BUILDING RESTRICTIONS.
   Where the owner of a parcel of land sold part of the property subject to building restrictions limiting its use to residence purposes only and not expressly providing that only single dwelling houses should be erected on each lot, and where no deed in defendant's chain of title contained such restriction, although it appeared that other conveyances in the block had been interpreted by the owners of the property as excluding apartments and business structures, and where defendant was not shown to have

Digitized by Google

had notice of complainants' claim that all the property along the block was subject to such restriction, the court erred in restraining defendant from erecting an apartment house upon his land, since no acts of the grantor in the original conveyance, done subsequently to the purchase by complainant or his predecessors in title, could affect his rights under the conveyance.

4. SAME—NOTICE.

It is not a general rule recognized by the courts that the mere construction of single dwellings or adoption of any particular style of architecture is notice to the owner of a lot within the block or neighborhood that the property is all restricted to residential or other purposes.

5. SAME—EVIDENCE.

Proof that the defendant necessarily observed that the street on which his lot faced was a residence street of single houses on each lot and that no business places or apartments fronted thereon, that other proprietors adjoining his property observed the rule of restriction, was not notice which would charge the defendant with information that a general plan of restrictions had been adopted for the street which would be binding upon him, especially upon his express testimony that the agent who sold him the property told him it was not restricted and could be used for business purposes, and that the attorney who examined his abstract advised him that he might build an apartment upon the lot as he intended, when he made the purchase.

6. SAME.

The rule that parol restrictions control all lots in a subdivision that has been platted under a general plan and consistently carried out as to all property and accepted by all persons in interest is not applicable to persons not participating in the acts or declarations of those platting it but acquiring the property prior to such parol declarations or limitations.

7. SAME—EQUITY.

The mere fact that the conduct of defendant in relation to the property was open to criticism was not sufficient reason in equity for enjoining him from constructing an apartment house, in the absence of sufficient evidence that he had clearly violated restrictive conveyances in the chain

Digitized by Google

of title: courts of equity will not aid complainant in restraining the use of another's property unless the right to the restraining order is plain.

Appeal from Wayne; Murphy, J. Submitted April 26, 1915. (Docket No. 103.) Decided September 29, 1915.

Bill by Walter J. Casterton and others against Samuel Plotkin to enforce certain building restrictions. From a decree for complainants, defendant appeals. Reversed.

Dohany & Hersch, for complainants.

Earl I. Heenan and *Jasper C. Gates,* for defendant.

STEERE, J. On July 23, 1906, Mary C. Gamble, the then owner, recorded in the office of the register of deeds of Wayne county her plat of "City Heights subdivision of the south 330.70 feet of the north ½ of ¼, section 24—10,000-acre tract," being a strip of land, of the width stated, in the village of Highland Park, lying adjacent to the north boundary of the city of Detroit, extending east and west between Woodward and Oakland avenues, which run north and south, Oakland being east of Woodward. Through the center of this strip, as platted, Tennyson (also called St. John) avenue runs east and west the entire length from Woodward to Oakland, crossing John R. street, which runs north and south between the two named avenues through the subdivision. The strip is subdivided into 124 lots, 6 of which are fronted on Woodward avenue. The remainder front along both sides of Tennyson avenue, the 2 farthest east lying against Oakland.

Defendant Plotkin now owns lot 66 of the subdivision, and this suit was brought to restrain him from erecting upon it a brick veneer, two-story, 14-family apartment building. This lot is at the extreme south-

Digitized by Google

eastern corner of the plat, a corner lot, fronting 44.30 feet on the south side of Tennyson avenue, its east side abutting 131.35 feet on Oakland avenue, which, at the time this suit was commenced, was a business street occupied by a double-track street railway line, with places of business of various kinds extending along it on both sides in the vicinity of and opposite where Tennyson avenue joins it. At the other end of the subdivision, where Tennyson avenue joins Woodward, the six lots fronting west on Woodward had upon them a number of stores and apartment houses, the corner stores having entrances from Tennyson as well as from Woodward avenue.

The recorded plat of this subdivision contains no restrictions. Lots 1 to 6, inclusive, fronting on Woodward avenue, were sold for business purposes without restrictions. One hundred and twelve lots in the subdivision were sold and conveyed with restrictions limiting their use to residence purposes only, but a single house to be built upon the premises, not less than two stories in height, 22 feet from the front street line, and costing not less than a specified sum. The remaining six lots, including 66, were sold under limitations which did not contain the express restriction to a single house, merely prescribing that the use should be "for residence purposes only," the restrictions in that particular being in all six substantially as in defendant's deed, which is as follows:

"This lot is restricted for residence purposes only, and no building is to be erected on the same with a flat roof or more than two and one-half stories in height and to conform to the building line of the street, being not nearer than 22 feet to the street line, and costing not less than $2,500."

It is shown, and cannot seriously be denied on this record, that the proposed building complies with the letter of all these requirements. The testimony dis-

Digitized by Google

closes, however, that there are now 107 single dwelling houses upon Tennyson avenue, which is a strictly residence street, except the Woodward avenue end.

Complainants claim, with supporting testimony, that when Mary Gamble platted and offered this subdivision for sale, it was her purpose to limit the Tennyson avenue frontage not only to residential purposes, but to single dwelling houses, so instructing her agents to whom she intrusted its management and sale, and that this plan has been published, insisted upon, acquiesced in by purchasers who built, and consistently observed, until defendant sought to violate it.

Defendant's title to lot 66 originated from the owner of this subdivision June 3, 1907, in a contract of sale given by her to John and Loie Cramer, containing the same restrictions, so far as material here, found in defendant's deed. No restriction such as that sought to be enforced here—to a single dwelling house—is found in any of the conveyances in his chain of title. The records further show that the title of each of the complainants in this suit originated from the same owner of the subdivision subsequent to June 3, 1907.

Inasmuch as defendant's deed does contain restrictions specifying just what use can, or cannot, be made of the property, and sets limitations for the kind of building which may be built, nothing further or different is to be implied.

"Restrictions in deeds will be construed strictly against the grantors and those claiming to enforce them, and all doubts resolved in favor of the free use of the property." *James* v. *Irvine*, 141 Mich. 376 (104 N. W. 631). See, also, *Walker* v. *Renner*, 60 N. J. Eq. 493 (46 Atl. 626).

In the *James Case, McMurtry* v. *Investment Co.*, 103 Ky. 308 (45 S. W. 96, 40 L. R. A. 489), is cited, which is a suit brought to restrain the erection of an apartment house in violation, as was urged, of residence

Digitized by Google

restrictions similar to those in defendant's deed. In denying relief that court said:

"It is shown, indeed admitted, that these different apartments or flats are places for persons to reside in, but it is contended that the language of the restriction conveys the idea of a single residence for a single family, or at any rate excludes the idea of a number of residences under the same roof or in the same house.

"We think, however, that to give the language used this meaning would be to extend its scope beyond the expressed intention of the parties. The purposes for which the house is to be erected on the court were 'residence purposes only.' * * * If the intention had been to permit the erection of only segregated private residences, the instrument would doubtless have so provided."

At the time Mary Gamble sold this lot in 1907, parting with right of possession and control of the title, restricting its use "to residence purposes solely," she yet owned this entire subdivision, so far as the records disclose, subject to no restrictions, with the exception of one lot, No. 8, near Woodward avenue, to the west of John R. street, in another block, and over a third of a mile distant from Oakland avenue. This had been sold with restrictions for a single house. If it were to any degree inferable that such conveyance of lot 8 indicated a general plan of restriction to single dwellings, extending as far as Oakland avenue at the extreme end of the subdivision and in another block, it was then impliedly negatived and abandoned by the sale of lot 66 limited to residence purposes solely, made by the same owner of the subdivision before any improvements were started in the subdivision. It is not shown that there was at that time anything else in the plat as recorded, conveyances given, or condition of the subdivision itself to impress the contract given for lot 66 with restrictions other than those embodied in it. Manifestly no subsequent conveyances or acts of Mary Gamble or others to which defendant or his pred-

Digitized by Google

ecessors in title were not parties and in privity could affect his title or change the restrictions imposed on lot 66. Defendant's chain of title shows that his predecessors did not recognize in their conveyances any restriction to a single house, nor in that particular enlarge the conditions imposed when Mary Gamble sold this lot on June 3, 1907.

Clearly the restrictions which she imposed would not have been violated had the purchaser then proceeded to erect upon the lot an apartment house for residence purposes solely. He was under no obligation to improve the property. Allowing the lot to remain vacant imposed no duty upon the owner to watch and object to what others were doing with other lots in the subdivision, in order to protect this vested right. Other purchasers were, in fact, using their lots for residential purposes in harmony with the very use to which lot 66 was restricted. No court has gone so far as to intimate a rule that the mere building of single dwellings or the adoption of any particular style of architecture by others in a block is notice to the owner of a lot only restricted to residential purposes that he must do likewise or protest in order to protect his rights.

It is urged for complainants that not only was a uniform plan for single dwelling houses announced in the beginning, but that it has consistently been adhered to by all parties in interest since, recognized as binding and enforceable upon all who purchased in the subdivision, in reliance upon which many bought lots and established homes there. It is shown in that connection that this was advertised as a strictly residential subdivision when put upon the market; that a sign heralding that fact was placed at the entrance of the avenue; that an advertisement, with flaming headlines and a tracing of the plat, was published in a Detroit paper, and dodgers were circulated stating,

Digitized by Google

"Building restrictions for residences only; no flats or stores." Copies of these dodgers and notice of sale in the public press produced in evidence indicate that these enticing restrictions apply to the entire plat delineated above them, including the Woodward avenue end, which was sold without restrictions and upon which there are "flats and stores." Amongst the many inducements portrayed in these notices we find no mention of the use of each lot being limited to a single house or dwelling. The advertisement also prominently states:

"Building line restriction is 22 feet from street line on each side, making a distance of 104 feet between the fronts of the houses on the avenue."

This restriction was embodied in the conveyances of all lots fronting on Tennyson avenue, and is shown to have been consistently violated, in the particular that the verandahs of most of the houses built encroach nearly eight feet beyond the specified line, and in numerous cases bay windows project a substantial distance beyond it. In *Ogontz Land, etc., Co.* v. *Johnson*, 168 Pa. 178 (31 Atl. 1008), a suit brought to enjoin construction of a porch beyond building line restrictions, the court said:

"While merely incidental encroachments on this space by steps, or eaves, or ornamental projections might not amount to violations of the agreement, * * * yet a porch extending the whole width of the house as a substantial and integral part of it is clearly so. If it can occupy 8 feet of the reserve space, it could as well occupy the whole 15 feet to the fence line, and thereby destroy the open, uniform, general effect meant to be secured."

See, also, 4 Ballard on Real Property, § 148, and cases cited.

As most purchasers in the subdivision who bought after lot 66 was sold were restricted to single dwellings,

Digitized by Google

and built in compliance with their restrictions, and it was represented by the owner of the plat and her agents that all purchasers were or would be so restricted, it may be fairly said to have been the general understanding amongst those interested and located along Tennyson avenue that such was a universal restriction, and an enforceable plan for Tennyson avenue frontage. But lot 66, which had a side frontage on Oakland three times greater than its end frontage on Tennyson, was sold before complainants purchased, or any of these improvements were made, with its defined restrictions which have been consistently repeated in subsequent conveyances by succeeding owners who are not shown to have participated in or acted upon or in their conveyances recognized the subsequently developed scheme, or plan, of restricting this residential district to single dwellings only, or to have waived any of their vested rights as granted and evidenced in their muniments of title. It is an elemental rule that one person is without the least power or capacity, in the absence of delegated authority, to release or change the rights of another in land. *Coudert* v. *Sayre,* 46 N. J. Eq. 386 (19 Atl. 190).

Under the general proposition of law that a general plan of restriction such as shown here is valid and enforceable and the fact that a portion of the conveyances do not contain the restriction may not defeat the same, it is contended by complainants that subsequent conditions developed on Tennyson avenue which brought lot 66 under the single dwelling restriction, and defendant was a purchaser with actual notice that such was the case. The proof to sustain this is that he actually saw, and necessarily noticed, Tennyson avenue was a residence street of attractive homes, with single houses on each lot and no apartment houses or business places fronting upon it. As conditions then existed, he also saw that this comparatively short street

Digitized by Google

terminated at either end in business sections upon important business thoroughfares; that the lots in this subdivision on Woodward avenue were devoted to business purposes, and lot 66 at the other end of the plat, with a side abutment of over 130 feet on Oakland avenue, was occupied by a real estate office. He testified, and it is not disputed, that he talked with and bought the lot from a real estate agent, who had the property for sale, in an office on the lot, and who told him it was not restricted, but could be used for business purposes the same as the Woodward avenue end; that he tentatively made the purchase with that understanding, making a deposit of $50, and then obtained an abstract which he submitted to an attorney, who advised that he could build an apartment building upon the property, and he accordingly closed the purchase, had plans prepared for a $20,000 apartment building, made available by the Oakland avenue frontage to comply with the restrictions in his deed and abstract as to roof, height, and 22-foot distance from the Tennyson street line, and was proceeding to build when warned and forbidden by complainants, who, when he did not desist, restrained him by this suit.

Can it be said that what he saw or was told operated as legal notice that all this subdivision, or even every lot fronting on Tennyson avenue, including 66, lying against Oakland, was restricted to a single dwelling? Though told by the agent on the premises that this lot, located along a business street, was unrestricted, he obtained an abstract and consulted counsel before closing the deal. Finding it restricted to residence purposes only, he was content to purchase and to comply with the restrictions as disclosed by his abstract. The rule of restrictions resting in parol as to certain lots in a subdivision under a general plan, developed and consistently maintained, has not yet been carried in its application to previously acquired titles not so

Digitized by Google

restrained, held by non-participants and their grantees who are strangers to the plan with antedating rights.

The cases of *Tillotson* v. *Gregory*, 151 Mich. 128, 132 (114 N. W. 1025), and *Allen* v. *City of Detroit*, 167 Mich. 464, 469 (133 N. W. 317, 36 L. R. A. [N. S.] 890), cited and relied upon as sustaining complainants' position, involved and turned upon other facts and principles than those disclosed here. The broad rule that under certain circumstances a general plan of restriction to certain purposes may be initiated, maintained, acted upon, and accepted by all in interest to a point where it becomes binding on lots not otherwise restricted in a generally restricted subdivision was there recognized, but in the *Tillotson Case* the court found from the proofs no such restriction as contended for, held that a restriction in defendant's title "for residence purposes only" was not violated by the erection of a four-family flat, and dismissed complainant's bill; while in the *Allen Case* it appeared that the original owner of the subdivision, who previously had, by written restrictions in most of his conveyances and by distinct contracts written or oral in all cases, "fully understood, accepted, and acted upon by all who purchased," subjected all lots sold by him in that district to a general plan limiting their use to residential purposes, was himself thereafter negotiating a sale of a lot and a fraction to the city without restrictions, for the erection of a fire engine house upon it. Notice was served upon the city by previous purchasers from him of neighboring lots who had erected homes upon them before the sale was consummated. It was held the original owner who initiated and was responsible for such general plan of restriction to residential purposes might not sell without adhering to his plan, and that the city, having been timely notified and fully informed, would take subject to such plan if it purchased. Here, as already pointed out, complainants are subse-

Digitized by Google

quent purchasers under restrictions not originally imposed upon defendant's title, and which they now seek to impose, a very different proposition from a subsequent purchaser taking the benefit of restrictive covenants expressed in a prior purchase.

We fail to find in the cases cited by complainants, too numerous to review at length, that the rule contended for has been enforced under facts analogous to those disclosed here. In many of the cases referred to the restrictions to be interpreted and sought to be enforced were contained in the defendant's own deeds or chain of title; in others their titles originated from the owner of the subdivision subsequent to that of complainants, in whose favor rights had arisen of which defendant had express notice, or by active participation had become parties to a general, developed plan of restriction.

It may be conceded, as insisted by complainants, that defendant's conduct and retorts in connection with his building project indicate that neither his presence nor proposed improvements are desired or desirable in that community; but that alone will not justify an injunction. Equity follows the law, and equity courts are not yet endowed with power to enforce the golden rule against the cupidity of those acting under strictly legal rights of property. Complainants have failed to establish a proposed violation by defendant of any of the restrictive covenants in his chain of title, or to clearly show that subsequent events have by legal implication imposed additions to such original restrictions. Courts of equity do not aid one man to restrict another in the use to which he may put his property unless the right to such aid is clear. *Fortesque* v. *Carroll*, 76 N. J. Eq. 583 (75 Atl. 923, Am. & Eng. Ann. Cas. 1912A, 79); *Camovito* v. *Matthews*, 82 N. J. Eq. 218 (88 Atl. 187).

From the foregoing views it follows that the decree

Digitized by Google

of the lower court will be reversed, and complainants' bill dismissed, with costs to defendant.

BROOKE, C. J., and KUHN, STONE, OSTRANDER, BIRD, and MOORE, JJ., concurred.

Justice MCALVAY, who sat in the case, took no part in this decision.

PEOPLE, *for use of* H. HOUGHTON & SONS, *v.* TRAVES.

1. COMPROMISE AND SETTLEMENT — CONTRACTS — PRINCIPAL AND SURETY—EVIDENCE—DEBTOR AND CREDITOR.

   Where a contractor, engaged in constructing a public building, became financially involved, and, at a meeting of his creditors, offered to give 3-year notes for his various accounts and some of the creditors or their representatives were not present, but others who were at the meeting expressed their willingness to grant the request if all would join in doing so, there was insufficient evidence to entitle the debtor's surety on his construction bond to a directed verdict upon the ground of a compromise and extension of time.

2. SAME — EVIDENCE — TRIAL — STRIKING OUT TESTIMONY — CONCLUSION OF WITNESS.

   The testimony of defendant that, when he had made a proposition to his creditors, at a meeting, to give them 3-year notes for his indebtedness, they agreed to it, was incompetent as proof of their consent and the trial court did not err in striking from the record that part of his statement relating to the alleged agreement, as a conclusion, where he afterwards admitted that some of his creditors were not present and that he was not sure that one of those who was present expressed his consent.

3. SAME—ACCEPTANCE—CONCLUSIONS.

   Nor was it erroneous to strike out the testimony of an-

Digitized by Google

other witness who was at the alleged meeting of creditors and stated that he went away with the impression that everybody present at the meeting would accept defendant's proposition, and that most of the creditors seemed to be satisfied; the court granting an opportunity to counsel to show what the actual facts were and what took place.

4. EVIDENCE—SALES—DELIVERY—ADMISSIONS.

Plaintiff sold to defendant Traves a quantity of material for use in the construction of a schoolhouse and upon the trial offered in evidence delivery slips signed by the defendant, also books of account showing the amount due. Defendant's counsel admitted that the receipts which bore defendant's name were correct and might be received. Proof was made as to plaintiff's method of sale and delivery and the method of keeping track of the same. There was testimony tending to show that regular statements of account were made to Traves without objection and plaintiff's auditor testified to the sending of the statements to defendant. *Held*, that such testimony, with other proof having a tendency to show the claims of plaintiff, was admissible and presented a question for the jury, in a suit on defendant's construction bond to which the contractor and surety were both parties.

5. SAME—PRESUMPTIONS—DELIVERY.

Proof tending to show that the material for building was ordered by the contractor and delivered at the place of construction, with evidence that the contractor gave his notes without objection, for the price, and that monthly statements of account were rendered by the vendor to the buyer, who made no complaint as to their correctness, was evidence of the correctness of plaintiff's claim and that the material was used for contract purposes, in a suit against him and his surety on the construction bond.

6. PRINCIPAL AND SURETY — EXTENSION OF TIME — RELEASE OF SURETY—BILLS AND NOTES.

The acceptance by the vendor of the notes of said contractor, which the former discounted to obtain credit or funds, did not release the surety unless it suffered prejudice by the extension: nor did payment of interest or the addition thereof to the renewal notes operate as a release, where the surety was paid for its services and suffered no injury by the action.

Digitized by Google

7. SAME—DISCHARGE OF LIABILITY.

The rule of *strictissimi juris* does not usually apply to the undertakings of a surety company, acting for a compensation; but if a material variance in the contract is disclosed, the surety may be held discharged.

Error to Wayne; Mandell, J. Submitted April 28, 1915. (Docket No. 150.) Decided September 29, 1915.

Assumpsit by the People of the State of Michigan for the use of H. Houghton & Sons, a corporation, against William H. Traves and the Fidelity & Deposit Company of Maryland, a foreign corporation, upon a construction bond. Judgment for plaintiff. Defendants bring error. Affirmed.

Donnelly, Lyster, Brennan & Munro, for appellants.

Selling & Brand, for appellee.

STEERE, J. On May 26, 1910, defendant Traves contracted with the board of education of the city of Detroit to do the mason work, and furnish material for the same, in the construction of the Cass high school building, to be erected at the intersection of Grand River and Second avenues, in the city of Detroit. On the same date he furnished a bond to said board, in form required by Act No. 187, Pub. Acts 1905, to pay subcontractors, wages earned, for material used, etc., executed by himself as principal and the Fidelity & Deposit Company of Maryland, a foreign corporation, the other defendant herein, as surety. This action is brought against Traves and his surety by and in behalf of H. Houghton & Sons to recover the purchase price of sand, cement, stone, and other material furnished to Traves and used by him in the construction of the said building. It is conceded that said bond was within the corporate power of the Fidelity & Deposit Company to execute and assume,

Digitized by Google

and that it was duly executed in prescribed form according to the provisions of the statute requiring a bond in such cases.

Plaintiff claims to have furnished Traves building material of different kinds as required for his contract, and used by him in the construction of said schoolhouse, delivered upon the premises between October 30, 1910, and November 1, 1911, except one small delivery made January 3, 1911. It is shown that in the course of their dealings plaintiff from time to time received from Traves, for the material supplied him, short-time notes running from 30 to 90 days, their dates extending over a period from June 22, 1911, to March 20, 1913. This action was begun August 5, 1913. Traves fell into difficulties and became financially embarrassed before the completion of his contract, being unable to meet his obligations when they fell due, or later.

In January, 1912, shortly after the last material was furnished by plaintiff, a meeting of Traves and some of his creditors was held in plaintiff's office, when he solicited of them an extension of time in which to re-establish his business and meet his indebtedness. It is claimed by defendants that plaintiff, through its authorized officials, co-operating with other creditors, agreed to the requested extension, and accepted a note in full of its account payable in three years. This is denied by plaintiff's officials, who claim that the proposal was not generally accepted by Traves' creditors, nor by plaintiff, and his note payable in three years was declined, word being sent to him that only short-time notes for his indebtedness would be accepted, after which he executed and furnished short-time notes to plaintiff for what he owed it.

The trial court submitted to the jury as an issue of fact, under proper instructions, the question whether plaintiff did, in January, 1912, extend to Traves time

Digitized by Google

of payment for three years as defendants claimed. This question was decided against defendants' contention. The only other issue submitted to the jury was whether the material, as claimed by plaintiff, was actually furnished by it to Traves and used by him in the high school building under his contract. The jury also found for plaintiff upon this issue and rendered a verdict in its favor against defendants for the sum of $3,573.33, for which judgment was entered accordingly.

At the conclusion of plaintiff's testimony, and again after both parties rested their case, counsel for the Fidelity & Deposit Company, defendant, moved the court for a directed verdict in its favor on the grounds that no delivery or use of the material such as would hold it as a surety had been proven, because there was no evidence of what material was furnished by plaintiff to Traves or used by him in the building; that plaintiff's books were not properly proven; and that extension of time in which to pay, as shown, granted without knowledge or consent of the surety on the bond, operated to release it. These motions were denied.

Defendants' counsel concentrate their numerous assignments of error into four different grounds for reversal, as follows: "Exclusion of evidence; books of account; admissions of Traves; extension of time."

Defendants' claim that the surety was released by extension of time arose under two heads or lines of testimony—one that plaintiff took short-time notes from Traves and renewals of the same during a period of approximately a year and a quarter after the account became due; and the other that it consented to an extension of time for three years and accepted in payment a note running for that length of time. The first proposition was disposed of by the court in plaintiff's favor as a question of law. The second, as before

Digitized by Google

stated, was submitted to the jury as an issue of fact, with the direction that, if they found from the evidence plaintiff did agree to extend the time for three years, it could not maintain this action, and their verdict must be for the defendant surety.

Without reviewing the testimony relating to the latter question at length, it is sufficient to say that it clearly involved an issue of fact for the jury. This issue was raised by special notice added to defendants' plea of the general issue, alleging that at a meeting of Traves' creditors held on or about January, 1912:

"It was mutually agreed that said creditors and each of them, including the above-named corporation, H. Houghton & Sons, should accept the promissory notes of said William H. Traves payable three years from date and in full payment of their respective debts and accounts, and that said creditors, including said H. Houghton & Sons, each in consideration of the fact that the others should and did accept said promissory notes, accepted said notes as aforesaid; that the note so accepted by said H. Houghton & Sons was not due or payable at the time that this suit was brought or is the same now due and payable."

It is conceded that at this meeting Traves asked for an extension of time, offering his creditors three-year notes; that some of the creditors or their representatives, including plaintiff, expressed a willingness to grant the request if all the creditors would join in doing so. It is clearly shown that all the creditors did not consent, a number not being present at the meeting nor represented; in fact, one of the largest creditors was not present nor shown to have at any time been asked for an extension, and later recovered a judgment for its claim in the Wayne county circuit court. The testimony of several witnesses was introduced as to what took place at this meeting. No witness testified directly that plaintiff agreed unconditionally to an extension. During his examination Traves testified to

Digitized by Google

what he proposed, concluding with the general statement, "And they agreed to it." This, on plaintiff's motion, was stricken out. Error is assigned on this ruling under *Detroit River Transit Co.* v. *Aldrich*, 176 Mich. 357 (142 N. W. 373). In that case it was held not reversible error to permit an answer to the question "whether or not Mr. Aldrich agreed to pay you 50 cents for the gravel." The witness answered: "Yes; I remember distinctly he agreed to pay 50 cents." This was in relation to a conversation between two individuals, one of whom was the witness being interrogated, and was but a fragment of his testimony as to a deal between them in which the facts were fully gone into on both sides, by direct and cross examination. The witness was giving the substance of what a particular person said to him. Under these circumstances no prejudicial error calling for a reversal was found. In the instant case the facts in relation to this meeting were also fully gone into by direct and cross examination. Traves was given full opportunity to relate all that occurred, tell what any particular person said, who agreed to his proposition, and in what manner. He by his own testimony negatived, and in effect struck out, this answer, by stating that a number of his creditors were not present or represented, that he did not know that a Mr. Wolff, who was present and afterwards absolutely refused, ever opened his mouth at the meeting, that he could not tell exactly what anybody did say, but from what those who spoke said he "took it for granted they all agreed." We find no error in the court striking out this omnibus, general statement that "they agreed to it," when the witness himself shows that all did not, and testifies that he simply took it for granted.

A witness named Daigle, who was present representing a creditor, said:

"All I can remember hearing was that Mr. Traves

Digitized by Google

got up and made this speech. I did not hear what the other people said."

And he further testified that:

He "went away from there with the impression that everybody there would accept this condition that he put forth; * * * that most of the people and I would accept the condition; * * * most of the people seemed to be satisfied with that."

The latter testimony was stricken out, the court saying in part:

"What satisfied you of that? * * * How—by words or looks or actions, or what? * * * You said you came to the conclusion that certain persons who were there understood certain things; what was it that influenced you in drawing that conclusion? In the meantime the testimony concerning that may be stricken out; all testimony concerning an impression or conclusion of the witness may be stricken out."

The distinction between opinion and fact as applied to his case being correctly stated by the court as follows:

"A lot of men get together and talk back and forth, and that talk must form a basis for any contractual relations between the parties, and if that talk was not given, no contractual relations can be had. Some words must be given as a basis for some impression or conclusion."

Full opportunity was granted the witness to tell what was said and in what manner the consent, of which he had an impression, was expressed. Under such circumstances we see little force in the assignment of error upon this ruling.

Counsel for defendant say in their brief:

"To prove the receipt, by Traves, of the material for the price of which the suit was brought, the plaintiff relied upon its books of account, and upon certain admissions by Traves as hereinafter described," both

Digitized by Google

of which are claimed to have been erroneously admitted.

If the evidence of delivery, receipt, and use of the material sought to be recovered for was confined to plaintiff's books and proof of admissions by Traves, these objections might call for more serious consideration; but we think the record discloses much more. To establish its *prima facie* case plaintiff produced but two witnesses, one to prove the bond, and the other, George Harkness, who became manager and auditor for plaintiff after the delivery of this material, but was familiar with its books, files, business methods, and records. He produced in court its books, slips for delivery of this material, invoices, etc. These were numerous and voluminous. There were 664 delivery slips, the majority signed by Traves himself and some signed by his authorized employees. When these were offered in evidence counsel for defendant said:

"You offer them to show the material shown in the slips were delivered to him?"

And, being answered in the affirmative, they conceded:

"That the material shown in certain of those slips was delivered and received by Mr. Traves, and at the job, namely, the ones that were receipted for by him, either his initials or his name, or the ones receipted for by three other persons who were authorized to receipt for him, their names being, as was stated by counsel, Roran, Wilson, and Pata."

After some further discussion and statement by plaintiff's counsel as to what further it was proposed to show in that connection, defendants' counsel said:

"We will admit in evidence without objection such ones of these slips as bear the receipt of Mr. Traves' name, or any one of the names I have mentioned, but as to the others that are not receipted, or that bear

Digitized by Google

the signature of some person—some other person—we object to their admission."

The slips receipted by others were few in number, and of small amount after March 11, 1911. Payments had been made which balanced Traves' account up to that date, and plaintiff only asked and recovered a verdict for material delivered at and used by the Cass high school building after that time. Credit was also given for $245.30 worth of cement sacks returned, not all of which were shown to have been received by Traves at this building. Harkness was examined and testified at length as to plaintiff's method of sale and delivery, showing, in brief, that when an order was received for material to be used at a certain place a delivery slip was made in triplicate, with carbon paper, one being given to the price clerk and entered upon the proper record with the price of each article, and two copies were taken by the teamster with the load of material, who gave one copy to the purchaser or his representative at the place of delivery and returned the other to the office receipted by the person receiving the goods. An invoice would also be made out at the office with a carbon copy, which was retained, the original being mailed the same day to the purchaser. Monthly statements were also sent to the purchaser showing the total of each day's delivery. Witness testified, under objection, that Traves' accounts, which were in court, contained an exact transcript of the delivery slips, which would be duplicates as priced by the pricing clerk, one being mailed to Traves, and one posted in the ledger. The court allowed the witness to state the result of an examination of the books on this matter, "because it appears from the books that they are very voluminous, and every opportunity will be given to defendant to examine them with regard to the items testified to," and to counsel's further objection "to proving by saying what is in the books"

Digitized by Google

repeated this in substance. Plaintiff's books were not formally offered and received in evidence in its main case, though after a full cross-examination of Harkness defendants' counsel offered the ledger account in evidence. Harkness also testified without objection that Traves made no objection to the monthly invoices and statements sent him.

Plaintiff claimed, and claims, that by proof of the receipt of this material "on the job" or at the place where the contract was being performed, it raised a presumption that it was used in the building and made out a *prima facie* case—citing *Rice & Floyd* v. *Hodge Bros.*, 26 Kan. 164, 171; *Morrison* v. *Hancock*, 40 Mo. 561, 565. In overruling defendants' motion for a directed verdict, when plaintiff rested, the court said:

"There is the evidence of the slips, evidence that the amounts stated in the slips are entered on the ledger, evidence that the ledger accounts were transcribed upon a bill, and that the bill was delivered monthly to Mr. Traves, and that settlement or conversations were had, and in none of them was the account disputed."

Counsel for the defendant surety company called Traves to the stand in its own behalf, and in the course of his direct and cross-examination he testified that he received monthly statements from plaintiff containing a memorandum of where the material was delivered, which also appeared in the daily invoices sent him; that when the material was delivered it was accompanied by a delivery slip describing the article, amount delivered, name of driver, and when delivered, followed by a daily invoice sent through the mail; that he checked the slips up with the daily invoice, and if any discrepancy appeared notified plaintiff's office, and it was corrected; that his monthly statements were always correct for material received up to the time of giving the notes for their value; that he was allowed

Digitized by Google

5 per cent. for cash, otherwise 30, 60, and 90 days' time; that the prices he was charged were correct; that he never had any material delivered at the high school building which was used on another job. Plaintiff then called its bookkeeper, who produced and identified the carbon duplicates of the invoices which were set out in its bill of particulars and testified to personnally and correctly posting them into the ledger, and that monthly statements showing the transactions of the previous month, with any balance over from the month before as appeared by the ledger, were promptly sent to Traves every month. While perhaps this testimony would more properly have been part of plaintiff's main case, we think, under the circumstances disclosed, it was a matter in the discretion of the court, and find no material error in admitting these accounts or the manner of submitting such testimony to the consideration of the jury under the condition of the evidence when both parties rested.

Upon Traves' so-called admissions counsel cite an abundance of authority sustaining the proposition that declarations and admissions of the principal to be admissible must be part of the *res gestæ*, and made during transaction of the business for which the surety was obligated to bind the latter. This would apply to objections interposed against the testimony of other witnesses as to statements or admissions made by Traves subsequent to the transaction, but not to the testimony of Traves himself when called by defendant as a witness in his own behalf. In such case his testimony under oath as to material facts is for the jury to weigh as that of any other witness. Neither is the surety, having called him, in a position to invoke the rule. Upon this the court charged the jury that:

"The recognition by Traves of the correctness of the charges against him and the giving of his note therefor established *prima facie* that the materials charged

Digitized by Google

against Traves as delivered at that site were actually received and used in the construction of the Cass high school."

It is urged that this was error, because such recognition by Traves could only apply to his indebtedness to plaintiff, and not to the amount of his indebtedness for material delivered and used in the job for which the other defendant was surety. Not only does delivery of suitable material at the place of performing the contract, as ordered, raise a presumption of its use for that purpose, in the absence of any proof to the contrary, under the authority cited, but Traves himself testified:

"I never had any material delivered at the Cass high school that was afterwards used in another job. It had to be used there."

We find no error in the admission of Traves' testimony or the instructions of the court in relation to it.

Upon the claim of the release of surety by extension of time in accepting short-time notes and renewals of the same, it is urged that the court should have directed a verdict in favor of the defendant bonding company, under the undisputed evidence, instead of directing the jury, as a matter of law, that the surety on the bond was not thereby released from its liability.

Traves testified that by their method of dealing 5 per cent. discount of monthly bills was allowed for cash or time given for 30, 60, or 90 days. He gave the notes, and, not paying them when due, they were renewed. It was shown that plaintiff, in the conduct of its business, secured credit, indorsing and discounting notes of its customers, instead of discounting its own notes. In discounting these notes interest was charged plaintiff, and in some cases interest was added in the renewals, and it is contended that the facts bring the case squarely within the rule stated in *People, for use of The C. H. Little Co.*, v. *Grant*,

Digitized by Google

138 Mich. 60 (100 N. W. 1006). This may be conceded, with the marked exception, on which the dividing line is drawn by many courts, that in the *Little Case* the sureties, Archer and Porath, were natural individuals gratuitously signing Grant's bond for accommodation, while in the instant case the surety is an artificial person, a corporation, engaged in the business of becoming surety on bonds for profit. Of this distinction it is said:

"The trend of all our modern decisions, Federal and State, is to distinguish between individual and corporate suretyship where the latter is an undertaking for money consideration by a company chartered for the conduct of such business. In the one case the rule of *strictissimi juris* prevails, as it always has; with respect to the other, because it is essentially an insurance against risk, underwritten for a money consideration by a corporation adopting such business for its own profit, the courts generally hold that such a company can be relieved from its obligation for suretyship only where a departure from the contract is shown to be a material variance." *Young* v. *Bonding Co.*, 228 Pa. 373 (77 Atl. 623).

Defendant has not in its pleadings or proofs claimed or shown that it was in any manner prejudiced or actually harmed by the extension of time complained of. That payment of interest is not necessarily a controlling factor in this class of cases is determined by the decision in *Guarantee Co.* v. *Brick Co.*, 191 U. S. 416 (24 Sup. Ct. 142), where it appeared the materialman in whose behalf the action was brought had accepted short-time notes, drawing 10 per cent. interest, after the account had become due. It not appearing that the surety suffered any material harm thereby, the court held its bond was not released. This particular feature of the case has recently been considered and reviewed by our court in *People, for use of T. B. Townsend Brick, etc., Co.*, v. *Bowen*, 187 Mich. 257 (153 N. W. 672). We regard the principles there recognized as

Digitized by Google

applicable to the facts in this case, and controlling upon the question of extension of time.

For the foregoing reasons, we are constrained to conclude that the judgment of the lower court ought to be, and the same hereby is, affirmed.

BROOKE, C. J., and KUHN, STONE, OSTRANDER, BIRD, and MOORE, JJ., concurred.

The late Justice MCALVAY took no part in this decision.

GUIDO v. DETROIT STOVE WORKS.

MASTER AND SERVANT—NEGLIGENCE—INSTRUCTING SERVANT—ELEVATORS.

Evidence that a foreign laborer, 52 years of age, was instructed by the operator of a freight elevator how to run it, and how to use the lever and manage the gates or shutters, that he ran the same over 30 days without accident and that in some unexplained manner the elevator started and ascended, injuring him, had no tendency to show insufficient instructions by the employer so as to establish its liability for negligent injuries.

Error to Wayne; Tucker, J., presiding. Submitted April 13, 1915. (Docket No. 50.) Decided September 29, 1915.

Case by Guiseppe Guido against the Detroit Stove Works for personal injuries. Judgment for plaintiff. The court on defendant's motion for a new trial afterwards set the judgment aside, granting a new trial. Plaintiff brings error. Affirmed.

Digitized by Google

Henry F. Chipman, for appellant.

Keena, Lightner, Oxtoby & Hanley, for appellee.

BROOKE, C. J. Plaintiff, a native of Italy, at the time of his injury was 52 years of age, and had lived in this country 8 years—in Detroit 5 years—and had worked for the defendant for 2 years. During 18 months of that time he had worked in the barn, cleaning horses, washing wagons and automobiles, etc. From this employment he was taken into the factory, where the foreman instructed one Tano Wassella, who up to that time had operated the elevator, to instruct plaintiff how to run the elevator, and open and close the iron shutters inclosing the elevator shaft. The elevator was used for freight only.

Wassella showed the plaintiff how to start and stop the elevator by the use of a lever which controlled the electricity, and instructed him to permit nobody to handle it except himself, or to ride upon it unless accompanied by freight. The elevator was equipped with automatic gates, and in front of each opening there was placed an iron curtain or shutter, which it was the duty of the elevator operator to open in the morning and close at night. These curtains or shutters hung upon rolls fixed at the top of each opening. The operator was able to draw the curtain down, thus closing the opening, and in the morning to push it up upon the roll. After receiving instructions from Wassella, the plaintiff undertook the operation of the elevator and the raising and lowering of the curtains, and performed his duties in both respects with safety to himself and satisfaction to his employer for 30 days. During this period he ran the elevator up and down, stopping at the various floors (of which there were five) as occasion required for the movement of freight.

It was the plaintiff's duty to close the iron curtains at 4:55 p. m. At about that time on the day of his

Digitized by Google

injury he had the elevator at the top floor. He descended to the first floor, where a fellow employee instructed him to carry a stove to the third floor. This he did, stopping the elevator opposite the third floor. He then removed the stove to a point about 10 feet distant from the elevator shaft, when he returned to the elevator, which was still in position. No one was in or about the elevator cage, except himself. It being time to close the iron shutters, he then turned, facing partially outside, and grasped the curtain at its lower edge to pull it down according to custom. While he was engaged in this act, he testified that the elevator started to ascend. This action of the elevator released the automatic gate, directly under which he was standing, which in descending struck him on the head. He fell backwards into the elevator, but testified that the descending gate caught his legs. The elevator continued to ascend, and according to plaintiff's testimony his legs were caught between the floor of the elevator and the fourth floor, where one leg was broken, and he received other injuries resulting in a double hernia. At the fourth floor he was thrown out of the elevator onto that floor; the elevator proceeding to the fifth floor, where apparently it stopped automatically.

The plaintiff offered no testimony tending to show that either the elevator or any of its appliances were out of order. He further offered no testimony tending to show how the elevator was started. He contented himself by showing that it did start, and by asserting that he himself had not started it. He testified that during the entire month during which he had operated the instrumentality it had worked perfectly, and that it had worked perfectly on the day of his injury up to the moment it started while he was pulling down the iron shutter. No evidence was offered of the failure on the part of the defendant to properly inspect the machinery. Nor was any evidence introduced by plain-

Digitized by Google

tiff tending to show that the elevator could be started by any person or at any point in the building, except by the operator of the car in the car itself. The record being in this condition at the close of plaintiff's proofs, defendant moved for a directed verdict, upon the ground that no negligence on the part of the defendant had been shown. Counsel for plaintiff having stipulated that the trial judge, upon motion for a new trial, might set aside the verdict if one should be rendered in favor of the plaintiff, the court submitted the case to the jury upon one question only, which is indicated by the following excerpt from the charge:

"I have concluded to submit that question to you upon the sole proposition as to whether or not this man received, through Tommy, from the man there in charge, Mr. Gamble, such instructions as you consider, as reasonable men, a man in his circumstances ought to have received, and further than that you must be satisfied from his testimony introduced here that if it had not been for that, and if he had received instruction, such instruction as you believe he ought to have received, that this accident would not have happened. Only in that event can the plaintiff recover at all."

A verdict having been rendered in favor of plaintiff, a motion was made by defendant for the entry of a judgment in its favor *non obstante veredicto*. In answer to this motion, plaintiff filed an affidavit, made by the witness Tano Wassella, in which said Wassella described the mechanism of the elevator as follows:

"That said elevator is run by electric power, and is supplied with a certain rope, which is in the brick well hole or shaft which incloses said elevator, but which is outside of the car of said elevator, by means of which said rope said elevator can be set in motion from any point from the top to the bottom of said elevator well hole or shaft, by persons who cannot see the persons upon said elevator, unless the person starting said elevator was at the immediate level or in front of said elevator car, and, further, that said person in charge of said elevator could not see the person start-

Digitized by Google

ing said elevator, except under the same circumstances."

The court, in disposing of the motion, said:

"There is no testimony fairly tending to show the cause of the accident, and nothing in the case, in my judgment, tending to establish any definite negligence on the part of the defendant, unless it may be negligence in hiring such a man as the plaintiff was to run an elevator. Plaintiff did run it successfully for nearly a month, and I am convinced that, even if he were not sufficiently instructed in the first instance, the simplicity of the operation of the elevator was such as to warrant a finding that a man of the grade of intelligence of the plaintiff would and should easily have become entirely familiar with its management in less than a month. At the time of the trial, and after the conclusion of the testimony, the court announced to counsel that a verdict for defendant would be directed, unless counsel consented that if it were submitted to the jury, and a verdict for plaintiff resulted, that this court, if it afterward concluded that a verdict should have been directed, might set aside the verdict and judgment, and direct the entry of a judgment for the defendant as if a verdict had been in the first place directed for the defendant."

We are of opinion that the action of the learned trial judge was warranted under the following authorities: *Perry* v. *Railroad Co.*, 108 Mich. 130 (65 N. W. 608); *Voigt* v. *Car Co.*, 112 Mich. 504 (70 N. W. 1103); *Dombrowski* v. *Manufacturing Co.*, 180 Mich. 202 (146 N. W. 666); *Beach* v. *Railroad Co.*, 180 Mich. 524 (147 N. W. 586); *Meyer* v. *Chair Co.*, 180 Mich. 604 (147 N. W. 488); *Cressler* v. *Paper Co.*, 181 Mich. 422 (148 N. W. 176).

The judgment is affirmed.

KUHN, STONE, OSTRANDER, BIRD, MOORE, and STEERE, JJ., concurred.

The late Justice MCALVAY, to whom this case was assigned, took no part in this decision.

Digitized by Google

HENDERSHOTT *v.* MOORE.

EQUITY — ADEQUATE REMEDY AT LAW — INJUNCTION — TRESPASS —RESTRAINING INVASION OF PROPERTY.

Where defendants were charged by the bill of complaint with committing a simple trespass, in that they entered upon an island, consisting of two acres and upwards of land, proceeded to construct a house or similar structure upon it, the remedy of complainant was properly an action at law, not a suit in equity for an injunction to restrain the unlawful acts of defendants which were not shown by the bill to have constituted an injury to the freehold.

Appeal from Barry; Smith, J. Submitted June 9, 1915. (Docket No. 36.) Decided September 29, 1915.

Bill by Robert L. Hendershott against William Moore and others to enjoin a trespass. From a decree for complainant, defendants appeal. Reversed.

Rodgers & Rodgers, for appellants.

Colgrove & Potter, for appellee.

The bill of complaint in this case sets out that in the year 1887 the complainant and one William E. Powers purchased from one John H. Williams, a small island known as "Williams Island," containing about two acres and located in Gunn Lake, on the southeast quarter of section 32 in the township of Yankee Springs, Barry county. The value of said island is fixed in the bill of complaint at the sum of $100 and upwards. It is alleged that complainant, ever since acquiring title to said island, has exercised acts of dominion over it, planting it, and protecting its banks from the ravages of the waters of the lake, and paying taxes upon it each year since the date of the conveyance to him and

Digitized by Google

Powers. It is further alleged that on the 30th day of May, 1914, defendants entered upon said premises and commenced the erection of a building, and that defendants, or any of them, never had any title, possession, occupation, or control of said island, or any part thereof. The bill further charges that complainant fears defendants will seek to acquire title to said premises, that they evidently expect to continue to trespass upon said premises, that he feels they will do so unless restrained by the order of the court, that the continued trespass will necessitate a multitude of suits, that complainant cannot have an adequate remedy at law, and that the damage will be a continuing damage. Complainant prays for an injunction.

Defendants in their answer deny that complainant has any title to the land in question, and deny that any patent was ever issued by the government for the sale of said southeast quarter section of said township, but allege that said island has been universally conceded by every one who has been at all familiar with the circumstances to be a public island, owned by no one except the United States government. They deny that the complainant or his grantor have ever exercised any acts of dominion over said island. They further deny the jurisdiction of the chancery court, and aver that all and every of the matters in said complainant's bill of complaint contained are matters which may be tried and determined in a court of common law.

BROOKE, C. J. (*after stating the facts*). Upon the trial of said cause the complainant introduced much testimony tending to show acts of dominion over the disputed island and possession of the same consistent with its character. Defendants offered no testimony. A decree was rendered fixing title to said island in complainant and the heirs of William E. Powers, deceased, declaring defendants to be without any title

Digitized by Google

or interest in said land, and permanently enjoining them from further trespassing thereon.

At the outset we are met with a question of jurisdiction. So far as this record discloses, defendants committed a simple trespass upon lands claimed by the complainant to belong to himself and the heirs of his cograntee. That trespass consisted in going upon the lands in question, and erecting, or starting to erect, a building. Such an act on the part of the defendants would, it appears to us, have no tendency to injure the freehold, and is not a trespass of such a nature as, under the authorities in this State, would clothe a court of equity with jurisdiction. See *Nicholls* v. *Lumber Co.*, 157 Mich. 234 (121 N. W. 742), and cases there cited.

The bill of complaint is dismissed, with costs of both courts to defendants, and complainant remitted to his remedy at law.

KUHN, STONE, OSTRANDER, BIRD, MOORE, and STEERE, JJ., concurred.

The late Justice MCALVAY took no part in this decision.

BARGER *v.* BISSELL.

1. AUTOMOBILES—EVIDENCE—NEGLIGENCE—INFANTS.

Testimony in an action for the negligent injuring of an infant, of almost seven years of age, that she started to cross a paved avenue in the city of Detroit between two

Digitized by Google

streets, where there was no regular crossing, that she failed to look for approaching vehicles, that defendant's car, in charge of an experienced driver, was passing at a moderate rate of speed (from 7 to 9 miles per hour), and the driver who was watching for persons, etc., in the way blew his horn, got his feet on the brake and clutch, grabbed the emergency brake, and stopped as quickly as his car could stop, and turned to one side, as soon as she stepped into the street from behind a standing horse and wagon, that when the child went upon the pavement, she was only 20 to 25 feet in advance of the car, which defendant's testimony tended to show was less than that distance from her, *held*, insufficient to raise an inference of negligence on the part of the chauffeur.

2. SAME—CONTRIBUTORY NEGLIGENCE—ACTIONS.
Though the question of contributory negligence of a little girl, 6 years, 10 months of age, is in most cases for the jury, the conduct of the infant in unexpectedly attempting to cross a paved avenue, in the middle of the block, may be considered and has a proper bearing on the question whether defendant was guilty of negligence as a matter of law.

3. SAME—PLEADING—NEGLIGENCE.
In order to entitle the plaintiff to rely on the claim of negligence that the driver had no license to operate a car, the point must be alleged and relied upon in his declaration.

4. SAME.
In an action for personal injuries of a female infant under seven years of age, no presumption that the driver of the automobile that caused her injury was guilty of negligence is raised by mere proof of the accident.

Error to Wayne; Hally, J. Submitted June 9, 1915. (Docket No. 34.) Decided September 29, 1916.

Case by Orilia Barger, by next friend, against Edward W. Bissell for personal injuries. Judgment for plaintiff. Defendant brings error. Reversed.

George H. Prentis and *Harrison Geer*, for appellant.

Dohany & Dohany, for appellee.

Digitized by Google

STEERE, J. On the afternoon of March 25, 1911, plaintiff, a child six years, ten months, and ten days of age, started hurriedly to cross Gratiot avenue, in the city of Detroit, from the north curb at a point between Townsend and Sheridan avenues, and was struck by the right fore wheel mud guard of defendant's passing automobile, receiving injuries, the exact nature of which is not made clear in this record, but for which she recovered in this action, brought by her mother, as next friend, a verdict and judgment for $975.

Under their assignments of error, defendant's counsel first and most seriously urge that plaintiff's testimony totally failed to make a *prima facie* case of negligence, and ask reversal on the following grounds, which were properly preserved for review by timely objections, requests, and exceptions before verdict, and by a subsequent motion to set the judgment aside:

"(1) There was no evidence showing or having any tendency to show negligence on the part of defendant.
"(2) The verdict is contrary to the great weight of evidence."

The automobile which struck plaintiff belonged to defendant, then riding in the back seat, and was driven by his chauffeur, Edmund De Meyer, an experienced driver, who was familiar with the rules of the road and with the car, having driven it and one of the same make, previously owned by defendant, for several years. It was a Peerless seven-passenger car, and at the time of the accident all seats were occupied. Defendant had taken some friends for a ride to Mt. Clemens that afternoon, and they were returning to their homes in Detroit when the accident occurred, at about 4:30 p. m. It was then yet broad daylight.

The declaration charges that while plaintiff, a healthy child seven years old, was lawfully upon the

Digitized by Google

street, in the exercise of due care and caution, without negligence on her part—

"defendant did carelessly, recklessly, and negligently cause his said motor vehicle to be operated as to lose control of the same, and in such a manner as to be unable to avoid colliding with plaintiff, and at a rate of speed far in excess of that permitted by law, and which was without any proper regard to the traffic and use of said street, said Gratiot avenue being then and there one of the principal business streets of the city of Detroit and in constant use for the passage of vehicles, horses, and persons thereon, and without giving plaintiff any warning whatever of the approach of said motor vehicle, and without any attempt to avoid colliding with plaintiff, who was then and there crossing said street, and without using any proper precaution whatever to avoid endangering the life and limb of plaintiff, and did then and there bodily collide with, strike, and knock plaintiff to and against the pavement of said street."

The evidence is undisputed that plaintiff stepped quickly off the curb on the side of the street the car was running, and started rapidly to cross just in front of and diagonally from this closely approaching car, with her head down, without looking, her back turned partially from it and from the direction vehicles should be expected upon that side of the street. It is manifest that she exercised no care at all, and, if an adult, she would clearly be barred from recovery by her own carelessness and negligence; but with a child of her age the question of contributory negligence precluding recovery, in case the defendant is shown guilty of negligence, is usually an issue of fact for the jury. In passing upon the legal questions raised here, the materiality of her conduct in thus suddenly coming upon the street close in front of a passing automobile, in the middle of a block, is its bearing upon the question of defendant's negligence.

The evidence is undisputed that defendant's automo-

Digitized by Google

bile was properly equipped, was upon the right side of the street, for the direction it was going, driven by an experienced driver, and running slowly, within the speed limit, the highest estimate given by any witness being from 7 to 9 miles an hour. In equipment, speed, and manner of operation, no statute or ordinance was being violated. The only negligence finally claimed and upon which the case went to the jury was that De Meyer could and should have stopped the car quicker than he did when plaintiff came upon the street in front of him.

The facts of the accident are in the main undisputed. There were in the car three men, three women, and a boy. The boy sat beside the driver. They were going west into Detroit on Gratiot avenue, which has upon it a double-track street car line. As they approached Townsend avenue, which crosses Gratiot, they stopped just back of an inbound street car which had stopped at the street crossing to receive and discharge passengers, waiting back of it at full stop until the street car proceeded on its run and was about half a block ahead, when the driver started the automobile again, manipulating in gradual sequence the different speed appliances, as was customary when starting. They had proceeded but a short distance west of Townsend avenue when the accident occurred, the distance being stated at from 50 to 75 feet, and, also, to near the middle of the block. The distance from the north curb to the north rail of the double street car track was about 16 feet, and, owing to rigs standing along the curb, it was necessary to run within 5 or 6 feet of the car track. In front of a grocery store, called "Michels," located towards the middle of the block on the north side of the street, was a high-topped grocery wagon to which was hitched a horse standing facing west, and just as the automobile, coming from the east, was about passing that point, plaintiff came out of the en-

Digitized by Google

trance way to a flat over the grocery to the curb, close ahead of the horse, and started quickly to cross the street right in front of the automobile, as before stated. That her appearance on the street as she came out from beyond the concealing wagon and horse was sudden and unexpected, causing alarm to all who saw it, and hasty action on the part of De Meyer, is shown, and not questioned. De Meyer repeatedly asserted in varying language, according to questions asked in direct and cross-examination, that he was driving slowly and watching; that he noticed the different persons and things nearby as he passed along, and recalled seeing plaintiff come out of the passageway onto the walk in front with no expectation she would start to cross the street without looking, but almost immediately she appeared again beyond the horse, and he at once did everything possible to stop the car and avoid it hitting her. He consecutively described what he saw and did in part as follows:

"She came out in front of the horse all at once and was on the machine. * * * I couldn't stop any quicker—couldn't do any better to not allow the girl to run into the machine. * * * Well, as soon as I saw the girl, I blew the horn; I got my two feet, one on the brake, and one on the clutch, and my left hand on the steering wheel. After I blew the horn, I grabbed the emergency brake, so that I stopped instantly; stopped so quick as any machine could stop; turned over the engine to get out of the road, and at the same time stopped everything."

He stopped so suddenly as to throw the passengers forward in the car, and all witnesses who saw the accident confirm his testimony as to his making a quick stop, swerving the car away from the child as he did so, describing it as "almost simultaneously" with her appearance, "quickly," "suddenly," "almost instantly," "very sudden," etc.

In charging the jury the court rightly said:

Digitized by Google

"There is no evidence from which the jury will have a right to find that the automobile at the time of the accident was being driven faster than the laws of Michigan and the ordinances of the city of Detroit allowed. If the chauffeur driving the car sounded the horn, put on the brake, and released the clutch as soon as he saw the child starting from the center of the street, that was exercising reasonable and proper care and precaution under the circumstances."

The record does not disclose what portion of the evidence was construed by the court as tending to establish defendant's negligence and raise an issue for the jury, but it is indicated from counsels' briefs that certain testimony of De Meyer himself, and of Mrs. Boss, called as a witness by plaintiff, was held to tend in that direction.

The farthest distance between plaintiff and the automobile at the time she started from the curb, given by any witness, was estimated by Mrs. Boss as about 20 or 25 feet. She was coming from the west towards the scene of the accident and in a position where she could see the approaching car back and outside of the grocery wagon, and also had an unobstructed view of plaintiff. Her testimony is that when she first saw the car it was 20 or 25 feet from plaintiff, who had just come off the curb, walking fast and turned partially away from it, "facing me more," and the car, after it struck her, ran, she thought, about 10 or 12 feet; but she negatives this as follows:

"When the automobile struck her she fell at once, and then the machine came to a sudden stop, right in front of her. * * * She was lying in front of the wheel, with her head just about in front of the wheel —the right front wheel."

She also stated that as it stopped it had turned to the left with one front wheel on the street car track, and she did not hear the horn or whistle blown. The latter negative testimony can have no probative force

Digitized by Google

against the abundant and positive affirmative evidence from numerous witnesses that the horn was sounded. That she in her position saw the child more distinctly and noticed she was about to cross the street sooner than those in the approaching automobile, whose view was cut off by the grocery wagon and horse standing at the curb, in front of which and towards Mrs. Boss plaintiff passed, is not proof that De Meyer could have seen her on the street sooner than he did. The claim that De Meyer's own testimony raises an inference of negligence is apparently based on extracts from his somewhat protracted and grilling cross-examination as to details, in which answers to repeated questions as to times and distances not always consistent are urged as indicating that the car ran further after he saw plaintiff in danger than the distance in which he stated he could stop the car at the speed he was driving. While he gave figures in response to insistent questions, though protesting, rather disrespectfully at times, that he could not with certainty, he also at times during the inquiry stated he made no measurements, that the figures he gave were "a guess," said, "everything so close together I can hardly tell how far," and consistently repeated that as soon as he saw plaintiff on the street he acted at once and did everything in his power to avoid hitting her, at the same time quickly turning the car to the left away from her and stopping it. No reasonable and legal inference of actionable negligence can be drawn from his account of the accident considered in its entirety.

The testimony of the five adult passengers, though varying in minor details according to what each particularly noticed, fully confirms his general account of prompt action and a quick stop after the child appeared in danger. To illustrate, Mr. John B. McKay, who sat on the right auxiliary seat just back of the driver, and

Digitized by Google

stated he "saw the whole thing from start to finish," testifies in part:

"We were going very slowly down the avenue. * * * I remember a grocery wagon being there, and the little girl came out with a dash from the sidewalk, and I utterly screamed—they all say it was an awful scream— * * * and the man blew his horn. The little girl ran diagonally across. * * * She kept her head down all the way; rushed right into the car."

"*Q.* From the time you saw her leave the sidewalk how soon did you—when you saw her going across the sidewalk—make this outcry?

"*A.* Just immediately; I saw the thing was inevitable; I was afraid the little girl would be killed.

"*Q.* At the same time what did the chauffeur do?

"*A.* Blew his horn and twisted around his car. * * * The street was very narrow, * * * and almost at once as I said the accident happened. * * *

"*Q.* About how far did it go after it struck her?

"*A.* Oh, it stopped almost at once. * * * I don't think it went any feet at all."

Mrs. McKay, who sat in the rear seat at the right, and did not happen to be looking in that direction, possibly because more accustomed to it, does not give her husband's "awful scream" credit for the first alarm. She testified that they were going slowly along, "just crawling," the chauffeur occasionally sounding his horn, and she was noticing the people, many of whom were just coming from their work at that time, when—

"suddenly there was this gong commenced tremendous noises, and I turned around to see what it was, and Mr. McKay gave a shout, and I looked over and saw this little girl, and she was just on the curbstone then, and she stepped right off the curb, and didn't seem to pay the least attention to all of the noises that was around; her head was a little bent down; and after that I didn't see anything, because I thought she was killed. That is what I saw."

"*Q.* After you heard this gong and Mr. McKay making this exclamation?

Digitized by Google

"*A.* Then the car swerved a little and stopped suddenly. I myself didn't understand how we could stop so suddenly—stop so quickly. * * * What attracted my attention to the little girl was I first heard the gong in the car, the horn—when I first heard the horn. It tooted; it went very rapidly."

The controlling facts which took the case to the jury in *Winckowski* v. *Dodge,* 183 Mich. 303 (149 N. W. 1061), cited by plaintiff's counsel, are not in this case. Testimony in that case tended to show that the driver was running upon the left side of the road at a rate of 15 miles an hour, and struck a child coming from the rear of the wagon, while attempting without checking to cut across the road through a narrow passage between two vehicles he was meeting on the wrong side of the road. Had he driven upon the right side, the accident would not have occurred. The principle there involved is that "one who violates the law of the road by driving on the wrong side assumes the risk of such experiment." There was nothing experimental, unusual, or unlawful in the manner defendant's automobile was being driven when the accident occurred.

The contention is made that because De Meyer had no chauffeur's license he was presumptively guilty of negligence. Whatever might be thought of that proposition when properly pleaded, the declaration in this case contains no averment of negligence in that particular, and the question is not properly before the court.

Drivers upon highways are not held as insurers against accidents arising from negligence of children or their parents, and though in law such negligence in a particular case may not be a defense, as contributory negligence, for a driver also guilty of negligence, the fact of an accident does not establish liability or raise a presumption that the driver is negligent.

A careful consideration of the record in this case

Digitized by Google

leads to the conclusion that this unfortunate accident occurred as the result of an emergency on the highway which arose through no fault of the driver, and that his conduct, under the circumstances disclosed by the evidence, raises no inference of actionable negligence which makes out a *prima facie* case.

The judgment is reversed, and a new trial granted.

BROOKE, C. J., and KUHN, STONE, OSTRANDER, BIRD, and MOORE, JJ., concurred.

The late Justice MCALVAY took no part in this decision.

CHURCHILL *v.* GRAND TRUNK WESTERN RAILWAY CO.

CARRIERS—BILL OF LADING—INDORSEMENT.

In an action for the wrongful delivery of a car of wheat and a car of beans consigned to the order of Botsford & Barrett by bills of lading, signed respectively "Botsford & Barrett, per F. M. G., Shipper, Lapeer Grain Co., Churchill" and "Botsford & Barrett, per C., Shipper, Lapeer Grain Co., Churchill," the signatures indicating that the Lapeer Grain Company and Botsford & Barrett were shippers, their indorsement was necessary to a legal delivery and plaintiff could recover for delivery made by the final carrier on a forged signature to the bill of lading.

Error to Lapeer; Smith, J. Submitted June 10, 1915. (Docket No. 37.) Decided September 29, 1915.

Digitized by Google

Case by George H. Churchill against the Grand Trunk Western Railway Company for the wrongful delivery of certain grain. Judgment for plaintiff. Defendant brings error. Affirmed.

L. C. Stanley, for appellant.

Theo. D. Halpin, for appellee.

BROOKE, C. J. In this case plaintiff seeks to recover for one car load of wheat delivered by plaintiff to defendant carrier upon an order bill of lading consigned to the order of Botsford & Barrett, destination Pittsfield, Me., and one car load of beans likewise delivered to the defendant carrier, consigned to the order of Botsford & Barrett, destination Lynchburg, Va. The bill of lading controlling the movement of the car load of wheat was signed, "Botsford & Barrett, per F. M. G., Shipper, Lapeer Grain Co., Churchill." The bill of lading covering the car load of beans was signed, "Botsford & Barrett, per C., Shipper, Lapeer Grain Co., Churchill." Delivery was made by the final carrier upon a forged bill of lading. The fraud was perpetrated by the same men who perpetrated the fraud discussed by this court in the case of *Nelson Grain Co.* v. *Railroad,* 174 Mich. 80 (140 N. W. 486). A very similar situation was considered in *Turnbull* v. *Railroad Co.,* 183 Mich. 213 (150 N. W. 132), where the *Nelson Case* was distinguished. Plaintiff had judgment.

The only question involved in the case is whether it falls within the reasoning of the *Nelson Case* or within that of the *Turnbull Case.* We are of opinion that a fair reading of the signatures of these bills of lading indicates that the Lapeer Grain Company, as well as Botsford & Barrett, were shippers, and that, as such shippers, their indorsement upon the bill of lading was necessary before the carrier was justified in making

Digitized by Google

delivery. As the whole question involved has been recently fully covered in the two cases cited, a further discussion is not here necessary.

The decision in the *Turnbull Case* governs, and the judgment is affirmed.

KUHN, STONE, OSTRANDER, BIRD, MOORE, and STEERE, JJ., concurred.

The late Justice MCALVAY, to whom this case was assigned, took no part in this decision.

ALBERT *v.* PATTERSON.

1. FRAUDULENT CONVEYANCES — DEEDS — DELIVERY — HUSBAND AND WIFE.

   In proceedings to have a deed from defendant wife to her husband decreed to be void and invalid as in fraud of creditors, alleging that said deed was never delivered, evidence of the due execution and delivery of the deed which was not directly refuted, is *held*, sufficient to establish the validity of the deed.

2. SAME—EXEMPTIONS—HOMESTEADS—CONSIDERATION.

   Where defendant's equity in the property conveyed was less than the homestead exemption, the question of consideration is of no importance.

Appeal from Kent; Brown, J. Submitted June 15, 1915. (Docket No. 46.) Decided September 29, 1915.

Bill in aid of execution by Margaret Albert against Clara Patterson and another. From a decree for defendants, complainant appeals. Affirmed.

Digitized by Google

William Wisner Taylor, for complainant.

Myron H. Walker, for defendants.

BROOKE, C. J. On December 13, 1909, complainant secured an order for an execution for deficiency against the defendant Clara Patterson in the sum of $563.16. Judgment was rendered upon the following day, and levy was made upon the same day upon the following real estate: Lot 17 of block 1, lots 1, 2, and 3 of block 2, and lots 1 to 9, inclusive, and 11 to 19, inclusive, of block 6, of Kenwood addition replatted, in the county of Kent, State of Michigan. On the 21st day of December, 1909, the levy was released as to all of the above-described property except lot 17 of block 1. In April, 1911, complainant filed her bill in aid of execution. The relief prayed is that a deed dated March 10, 1900, and recorded December 6, 1909, from defendant Clara Patterson to her husband, defendant Edward H. Patterson, covering said lot 17, block 1, of Kenwood addition, be decreed to be void and invalid as in fraud of creditors.

The record discloses that prior to the year 1892 the defendant Edward H. Patterson was the owner of lot 17 in block 1, and many other lots, situated in said Kenwood addition; that said property at that time was heavily incumbered; and that, in order to secure a loan of $125 from one Powell, defendant Edward H. Patterson deeded the same to said Powell, as security only. Later, and on November 11, 1892, said loan of $125 having been repaid to Powell by Edward H. Patterson, Powell conveyed all the lots, including lot 17, which Edward H. Patterson had conveyed to him as security, to the defendant Clara Patterson. The record shows clearly that defendant Clara Patterson herself never invested any money in the premises in question, and on March 10, 1900, she executed a conveyance of all of said property to her husband, who ap-

Digitized by Google

pears at all times to have been the equitable owner of any equity remaining in the property. At the time of said conveyance (March 10, 1900), the property conveyed was subject to various incumbrances, amounting in all to $4,710. Much evidence appears in the record relative to the value of the property described in the conveyance as of March 10, 1900. There is considerable variation in the estimates of value, but the average would seem to fix it at somewhere in the neighborhood of $6,000. If this be regarded as the true value at that time, the value of the equity would be considerably less than $1,500, the amount allowed under the Constitution and laws as a homestead exemption. It is conceded by counsel for the complainant that during all the time from the date of the deed in 1900 to the date of the trial in 1914 the defendants have occupied the whole of lot 17 as a homestead.

It is the claim of counsel for the appellant that the deed from defendant Clara Patterson to her husband was never delivered. He bases this claim upon the fact that the deed remained unrecorded for upwards of nine years, and that in the interim the property continued to be assessed in the name of Clara Patterson, and that she made deeds, mortgages, and contracts relating thereto. On behalf of defendants there is positive testimony given by themselves of the execution and delivery of the deed, at or about its date, as well as the testimony of one of the subscribing witnesses to this same effect. In explaining the failure of defendant Edward H. Patterson to place the deed of record for some nine years, it is the claim of the defendants that, according to an agreement between themselves, defendant Edward H. Patterson was to pay his wife the sum of $100 as a consideration for the execution and delivery of said deed by her; that said sum was paid in small amounts from time to time, running over a considerable number of years; that

Digitized by Google

it was further agreed between the defendants that in the meantime the record title should remain in the defendant Clara Patterson, she to execute such deeds, mortgages, and contracts relating to the same as her husband should request. There seems to be no direct evidence in the record refuting these statements. The learned circuit judge, who heard the evidence, determined that the deed was executed and delivered, as claimed by the defendants, and after a careful examination of the record we have no hesitation in agreeing with his conclusion upon this point.

It is further apparently the claim of counsel for complainant that the value of the property at the time of the conveyance in March, 1900, was in excess of the incumbrances, plus the value of the statutory exemption. Although, as before stated, the evidence is somewhat in conflict, we think the finding of the learned circuit judge to the effect that the value of the interest conveyed by the deed of March, 1900, was less than $1,500 is supported by the weight of the evidence. The property conveyed being less than the homestead exemption, the question of consideration is of no importance. *Nash* v. *Geraghty*, 105 Mich. 382 (63 N. W. 437); *Palmer* v. *Bray*, 136 Mich. 85 (98 N. W. 849).

We are of opinion that the learned circuit judge reached a proper conclusion in the case, and the decree is therefore affirmed.

KUHN, STONE, OSTRANDER, BIRD, and STEERE, JJ., concurred. MOORE, J., did not sit.

The late Justice MCALVAY took no part in this decision.

Digitized by Google

LAVIGNE *v.* COYNE.

1. PARTNERSHIPS—CANCELLATION OF CONTRACT—FRAUD—EVIDENCE.
   In an equitable action to set aside a written contract of partnership between complainant and defendant, who were mature business men, and had been business associates for many years, where complainant's evidence of fraud and overreaching is met by defendant's evidence, complainant has failed to establish his case by a clear preponderance of positive and convincing evidence which would justify the court in setting aside the contract.

2. SAME—FRAUD—EVIDENCE.
   Evidence that complainant was 51 years of age; of varied experience in business enterprises; was an inventor and master mechanic before he reached his majority; was in the manufacturing business for himself for over eight years; had invented and patented over 200 mechanical devices; was at one time president of a motor car company, and at the time of the trial was president of a manufacturing company; was familiar with business methods and with contracts relating to patents as well as legal steps to be taken in obtaining same; objected to the form of the contract and had it changed, saying it was no good because they could not sue any one that infringed; had entered into numerous contracts regarding payment of royalties, and had before been engaged in litigation arising out of contracts concerning his various inventions, was competent to consider in connection with his claim that he was overreached and deceived into signing the contract.

3. SAME—CONTRACTS—EVIDENCE—TERMINATION OF CONTRACT.
   Complainant's contention that the formation of a manufacturing company was to terminate their contract is inconsistent with the facts, where the evidence shows that although the company was formed four months after signing the agreement, they continued their joint efforts and operations for over five years, defendant furnishing over $2,000 to perfect and patent new inventions, which complainant received and has never offered to refund.

Digitized by Google

4. SAME — CANCELLATION OF INSTRUMENTS — FRAUD — BURDEN OF PROOF.

Where complainant repudiates and asks the court to wipe out an instrument in writing, not on its face harsh, unfair, or in any particular questionable, which he signed after examination and change in form as he insisted, on the ground that he was inveigled into signing it by fraud and falsehood, the burden of proof is upon him, and where the evidence is not clear, convincing, and free from doubt, the decree of the court below dismissing the bill will be affirmed.

Appeal from Wayne; Mandell, J. Submitted June 18, 1915. (Docket No. 62.) Decided September 29, 1915.

Bill by Joseph P. Lavigne against John Coyne to cancel a written agreement of partnership alleged to have been obtained by fraud, misrepresentation and deceit, and for other relief. From a decree for defendant, complainant appeals. Affirmed.

John E. Moloney, for complainant.

George F. & Peter J. Monaghan, for defendant.

STEERE, J. This bill was filed to restrain two actions at law brought by defendant against complainant and to set aside a contract of partnership between them dated January 25, 1911, out of which said actions arose. The suit was heard in the Wayne county circuit court in chancery on pleadings and proofs taken in open court, resulting in a decree dismissing complainant's bill, from which he has taken an appeal to this court.

The parties to this suit became acquainted in 1902, while both were in the employ of the Detroit Lubricator Company, of Detroit, Mich., complainant being master mechanic and assistant superintendent of its factory, and defendant employed in a responsible posi-

Digitized by Google

tion connected with its business management. Complainant is a skilled machinist and mechanic of more than ordinary ability and an inventive turn of mind, having for many years devoted much time and attention to devising new mechanical appliances of various kinds, for many of which he secured patents. Through their association in the same employ defendant became interested in complainant's efforts in that line, and from 1902 to 1905, under an oral agreement for mutual profits, assumed and paid most of the expense of complainant's endeavors in the matter of new inventions.

On September 23, 1905, they entered into a written agreement, following up their former efforts and expenditures, looking to the utilization of complainant's inventions and a division of resulting profits. The immediate occasion for this written agreement was a project to organize a corporation to take over the business which they anticipated they could successfully develop with their experience in connection with new appliances invented and patented by complainant, and which in its name and products would tend to be a rival of the Detroit Lubricator Company, with the operations and business of which both were familiar. This first written contract, preceding the one directly in issue here, stated in outline, contemplated the invention of appliances and securing patents therefor by complainant, the expense of which defendant was to bear, the patents when finally obtained to be in the name of complainant, but defendant to share equally whatever was realized for them from the corporation which they would later organize, and by which they would be employed, their salaries received from such corporation to be divided equally between them. They were then and for some time thereafter on friendly terms, closely associated in their joint enterprises, and apparently had confidence in each other. Several de-

Digitized by Google

vices had already been invented by complainant and patents obtained therefor; the expense being defrayed by defendant under the preceding oral agreement.

Their proposed corporation, planned to take over and use complainant's inventions, was organized February 26, 1906, as the Lavigne Manufacturing Company, and considerable profit was realized by them from its promotion, though it is shown to have experienced a somewhat checkered, and not altogether profitable, career as a manufacturing enterprise. So far as disclosed, the profits were chiefly in the promotion. Both parties were stockholders and officers of the organization up to May, 1911. When this corporation was organized and first started in business complainant received from it a salary of $1,800 in money and $1,200 in stock, which was later changed on different occasions. Defendant remained with the Detroit Lubricator Company, receiving an annual salary of $3,000. In November, 1908, he also entered the Lavigne Manufacturing Company's employ at $2,000 per year, later raised to $3,000, and finally $3,600. From time to time they adjusted their salaries according to their pooling arrangement provided for in their contract, although it appears that on July 20, 1909, defendant was in arrears to complainant to the extent of about $400, which he claims was then balanced and paid in a loan of $1,000 made by him to complainant on that date.

Details of the many transactions between these parties and their relations with the company which they organized, as disclosed by the record, covering a period of about nine years, are too long to review here at length, but from this record as a whole we fully agree with the finding of the trial court that during all these years, regardless of what was in writing between them, these parties recognized, acted upon, and maintained their original partnership contract rela-

Digitized by Google

tions under the arrangement for co-operation and division of profits in patents, complainant continuing from time to time, according to his inspirations and opportunity, to invent new mechanical devices and get, or try to get, patents for them, while defendant continued to put up the money and defray the expenses incurred by complainant in such endeavors.

In the fall of 1910 it became acutely manifest that the Lavigne Manufacturing Company was in an unsatisfactory and unsound financial condition, for which various and conflicting reasons are assigned, and over which differences arose resulting in the relations of these parties becoming less friendly and strained to a point where each blamed the other for the unsuccessful condition of the corporation.

Complainant claims that, shortly after it was executed, he lost his copy of their first written agreement of September 23, 1905, the contents of which he did not fully remember, and charges that defendant, learning of this, later pretended he had also lost his copy, and thereafter falsely claimed that by its terms his former partnership rights in complainant's inventions continued, by which complainant was deceived and induced to both continue to accept money from defendant in aid of his patent projects, and later to sign the contract of January 25, 1911, at the solicitation of defendant, who then, falsely and with intent to defraud, represented that it was in substance the same as their first written agreement and to take the place of it, when in fact by the terms of the first all rights of defendant in any of complainant's inventions terminated upon formation of the Lavigne Manufacturing Company.

Defendant in his pleading and proof denies knowledge that complainant had lost his copy of the contract or representing to him a like experience, contends that the first written agreement related to and was intended

Digitized by Google

to cover only their proposed corporation, that the continuance of their partnership efforts and expenditures to develop some patent of value was thoroughly understood, agreed to, and acted upon without question by both for years thereafter, complainant inventing and patenting, while defendant defrayed the expenses, during which time a packless valve was patented; that no misrepresentation whatever was made by defendant as to the first or second contract, but the latter was signed understandingly by both parties after full discussion and alterations to meet complainant's views, as the culmination of their former agreements and dealings, oral and written, in their joint operations to patent complainant's inventions.

The packless valve patent appears to have had sufficient merit to afford some profits in royalties, which complainant at first divided with defendant, paying him in all $550, the last payment being made about October 31, 1910, but after friction arose over the management of the Lavigne Manufacturing Company, he made no further payments, and defendant, who had then left the company, brought two actions for his share of the royalties, which were followed by this suit. Defendant states he left the company May 6 or 7, 1911. Complainant states it was about two weeks after the second contract was signed, and says:

"At the time of execution of the contract * * * I did not know of any friction outside of the little friction we had. It became a question of my getting out or Coyne and Nagel getting out. Mr. Dwight came to my rescue and bought enough stock to control the corporation and keep me in."

This suit is brought by complainant to set aside a written contract between himself and a former associate with whom he had "a little friction" at the time he signed it, and who, he says, was trying to get him out of the company he had helped organize. He was

Digitized by Google

a business man of mature years, and signed after abundant time to examine it and after it had been corrected at his dictation. Before a court is justified in setting aside a written agreement of this nature deliberately executed between two business men, there must be a very clear proponderance of positive and convincing evidence sustaining the charges in complainant's bill that he was induced to sign it by fraud and overreaching deceit. The primary proof of this rests in complainant's testimony alone, which is met by equally positive testimony of defendant to the contrary. They are equally interested witnesses.

It is difficult to conceive that complainant is a man easily overreached under the circumstances disclosed here. He was 51 years of age at the time of this trial, of varied experience in business enterprises, states that he was an inventor and master mechanic before reaching his majority, was in the manufacturing business for himself in New Haven, Conn., for over 8 years, has invented and patented during his life over 200 mechanical devices, was at one time president of a motor car company, and at the time of this trial was president of the Lavigne Manufacturing Company. He was familiar with the business methods and organization of corporations and with contracts relating to patents, as well as legal steps customarily taken in obtaining the same. In the office of the attorney who drew this contract, who had formerly acted for him professionally in securing some of his patents, he objected to the form of the contract, and said it was "no good," because if each owned half they "could not sue any one that infringed," and the contract was changed at his dictation so that he retained title to the patents. He had previously entered into numerous contracts regarding payment of royalties, and had at different times before been involved in litigation arising out of contracts with persons and companies concerning

Digitized by Google

his various inventions. These facts are competent evidence to consider in connection with his claim that he was overreached and deceived into signing this contract which he now repudiates.

Four months after the first contract was signed the corporation which it contemplated, and which complainant claimed terminated their partnership as to patents, was organized; yet it is conclusively shown that their joint efforts and operations as to new inventions and patents continued as before; defendant pooling his salary with complainant and furnishing him money to perfect and patent new inventions. Just how much money defendant furnished to directly pay for patents is not clearly shown, but upon that subject, including pooling of salaries, it is shown complainant received from defendant in that connection from September, 1905, to January, 1911, over $2,000. There is no showing of any offer to refund before suit was begun.

We are impressed, from a careful consideration of complainant's testimony, as was the trial court, that it contains various contradictions and inconsistencies which seriously weaken its convincing force. Insisting in his direct examination that he early lost his copy of the first contract, told defendant of it, and in receiving money from defendant to finance his patents insisted it was on condition that the contract continued their partnership, he on cross-examination stated that he received the money without protest, and of the lost copy testified:

"I didn't know of that contract existing after it was made. I don't know where I put it after it was made. * * * Nothing came up that I know of that would make me look for it until just a little while before the eruption took place."

Though contending the whole agreement between them as to patents terminated upon the incorporation of the Lavigne Company, he testifies:

Digitized by Google

"When the old contract was made, it was to cover anything that we might make. I had been considering the packless valve for some 15 years."

It was patented in 1909, and defendant financed him in developing and patenting it long after the corporation was formed. He made no protest nor attack upon the validity of defendant's interest in it until, out of the numerous patents they obtained, this finally proved of some value and afforded some profit, and he was pressed by litigation to account to defendant for a share of the royalties he had collected.

We are unable to discover that there are overwhelming equities in this case appealing strongly in favor of either litigant. Complainant repudiates, and asks the court to wipe out an instrument in writing, not on its face harsh, unfair, or in any particular questionable, which he signed after examination and change in form as he insisted, on the ground that he, in fact, was inveigled into signing it by fraud and falsehood. The burden of proof on that issue rested upon him. His testimony to sustain the issue is met by defendant's testimony to the contrary. In such a case the courts require, and to set aside the written instrument must find, that the evidence of complainant rings true and of a character so clear, convincing, and free from doubt as to preponderate and carry conviction against defendant's evidence to the contrary, or the issue must be resolved against his affirmative contention.

A careful consideration of this record in that light has resulted in our reaching the same conclusion as that to which the learned trial judge who heard the case was led by listening to the testimony with the witnesses before him.

The decree is affirmed, with costs to defendant.

BROOKE, C. J., and KUHN, STONE, OSTRANDER, BIRD, and MOORE, JJ., concurred.

The late Justice MCALVAY, who sat in the case, took no part in this decision.

Digitized by Google

SALMER *v.* HICKS.

1. TRIAL—EVIDENCE—PROCEEDINGS IN JUSTICE'S COURT.

   In an action for wages by a farm hand, cross-examination of defendant as to proceedings in the justice's court is largely a matter of discretion with the trial court, where defendant stated he had not been allowed by plaintiff's counsel to take the stand and refute testimony given by plaintiff; but where he afterwards admitted that neither court nor counsel prevented his taking the stand, it was error for the court to allow the justice to testify to the same matter, which did not go to prove or disprove any issue on trial, but only tended to divert the attention of the jury to an immaterial issue, and confuse it with the real question, which was the agreement as to plaintiff's employment, and what, if anything, was yet due to him upon it.

2. SAME.

   While there was no direct testimony as to the result in justice's court, the prominence given the proceedings in that court indirectly indicated who appealed and why, and this, in connection with an expression of personal views by the court as to the statutory right of appeal, which tended to shadow the defense with a prejudicial inference, militated against the exercise of an unbiased judgment, and resulted in prejudicial error.

3. DAMAGES—EVIDENCE—EXCESSIVE VERDICT.

   A judgment for the full amount claimed in the bill of particulars, which is not warranted by plaintiff's evidence, is excessive.

Error to Saginaw; Gage, J. Submitted June 21, 1915. (Docket No. 83.) Decided September 29, 1915.

Assumpsit by John Salmer against George J. Hicks in justice's court for an amount claimed to be due plaintiff for wages. From a judgment for plaintiff defendant appealed to the circuit court. Judgment for plaintiff. Defendant brings error. Reversed.

Digitized by Google

Russell B. Thayer, for appellant.

Snow & Snow, for appellee.

STEERE, J. Defendant owns and operates a large farm near the city of Saginaw, upon which he maintains a dairy, selling and delivering milk and cream to customers in the city. Early in January, 1913, defendant hired plaintiff to work upon this place as a farm hand at $45 per month and house rent free; he, being a married man, to live upon the place in the house furnished him and board himself. He remained in defendant's employ from January 7 to July 8, 1913. Whether he quit of his own accord, or was discharged, is in dispute, and a material issue of the case. When he left, a disagreement arose over wages yet due him, resulting in his commencing this action in a justice's court of Saginaw county the following day. He subsequently recovered a judgment, and defendant removed the case by appeal to the circuit court of said county, where a trial by jury resulted in a verdict and judgment in favor of plaintiff for $166.85, being the full amount claimed under his bill of particulars, which is as follows:

Money due on work held back	$20.00
Three weeks' wages	52.50
624 hours' work overtime, 15 cents per hour	93.60
5 hours' work overtime	.75
	$166.85

A motion by defendant for a new trial, upon the ground that the verdict is unsupported by and against the great weight of evidence, was denied. Defendant's assignments of error are directed against the refusal to grant a new trial, certain rulings upon evidence, and parts of the charge given by the court. The case was primarily, and almost entirely, one of disputed facts, with no serious questions of law involved, except as introduced into the case along the border line of

Digitized by Google

doubtful testimony, in the cross-examination of defendant as to justice's court proceedings in the case. Counsel for defendant urge that this portion of the cross-examination was incompetent and prejudicial.

It appears that upon trial of the case in justice's court defendant was not represented by counsel, and, without taking the stand himself, undertook to conduct his own defense, opposed by the counsel who cross-examined him in the circuit. The cross-examination upon this subject occupies 6½ pages of the record, beginning with, "The summons was served upon you in this case, wasn't it?" and concluding with, "You got up and argued the case to the court, the same as I did?" This apparently recalled to defendant a somewhat unpleasant time, which he found it difficult to discuss with equanimity. Some of his impertinent and irresponsive replies to questions touching that event might well have been stricken out and checked with a reprimand, but, as followed up, led to uncomplimentary personalities between counsel and witness. After counsel had asked if the summons in the case was served upon defendant and received an affirmative answer, he proceeded to interrogate him as to the number of times he got the case adjourned, what the pleadings were, and his knowledge of the issue, asking, amongst other questions, if witness did not see the bill of particulars in justice's court. Upon defendant replying that he did not, the following occurred upon that subject:

"*Q.* You say you didn't see this paper? It appears to be the bill of particulars.

"*A.* Yes; you refused to show me that in court before Justice Clements; you said you didn't have to.

"*Q.* Don't you know you are telling something that is false?

"*A.* No; I know I can tell the truth better than you can.

"*Q.* Don't you know that is the paper that was left with the justice of the peace?

Digitized by Google

"*A.* I don't know anything about that paper, because I never saw it until today, in Mr. Thayer's hands here.
"*Q.* Do you swear—
"*A.* I am swearing now. * * *
"*Q.* You didn't have any attorney?
"*A.* No, sir; I didn't need any."

This was followed up by further questions, in answer to which defendant still denied seeing the paper, but admitted hearing it, or a similar paper, read in justice's court. After several evasive and impertinent replies, defendant squarely answered that in justice's court he heard plaintiff testify that he (defendant) agreed to pay him for extra services, or overtime, followed by these questions and answers, amongst others:

"*Q.* After you heard the testimony did you take the stand and give any testimony at all?
"*A.* I did not. There was no show for me to; you had the floor. * * *
"*Q.* Did you take the stand and testify at all?
"*A.* You would not permit me to testify, and you would not permit me to talk half the time; you ruled the court that day.
"*Q.* Do you mean to tell me that? * * *
"*A.* You told me to shut up several times through that case.
"*Q.* If I should say it now, it wouldn't be very much harm?
"*A.* Not a great deal. At times, when I wanted to speak, you got up and protested to the court that I was talking foolish; I wasn't talking law; no use to listen to such nonsense; and you did as you pleased. * * *
"*Q.* Did I, or the court, or anybody else, refuse to allow you to take the stand, the same as Mr. Salmer and our witnesses? * * *
"*A.* I don't know of there being any refusal."

During this line of examination defendant's counsel interposed several objections to it, without, however, taking exceptions, and at its conclusion moved to strike out as immaterial the testimony relative to proceedings in justice's court, which the court denied, saying:

Digitized by Google

"Your client has volunteered a good many things that reflect upon Mr. ————, and the justice as well. For that reason I permitted the counsel to ask him the questions he has with reference to what occurred there."

Later counsel for plaintiff called as a witness the justice before whom the case was first tried, and was permitted to show by him, against objection, that defendant was not prevented from taking the stand and testifying, and other matters in denial of defendant's charges of improper conduct by plaintiff's counsel, although the justice conceded, qualifiedly, that he "was boisterous and making a loud noise that day," which he testified was "what all the attorneys do as a rule."

Related to this alleged incompetent testimony as to the justice's court proceedings, and as indirectly emphasizing rather than relieving it, counsel for defendant also assign error on the following initiatory portion of the charge:

"While I think personally that the right to appeal from the justice's court to the circuit court should be limited to a certain amount, every man who has a lawsuit in the justice's court, considering himself aggrieved, has a perfect right under the law to file his affidavit, pay the costs there, and appeal the case to the circuit court, and have it tried over and over again. So the fact that it has been tried there is no concern of ours; it is for us to reach an independent conclusion in the case, in regard to the merits of it; and all the testimony that has been introduced here in regard to what transpired in the justice's court is purely immaterial to the issues in this case, and you should not consider it in any way, unless it in some way affects the testimony of some witness who has testified in the case. You will recall the way in which the matter crept in was some testimony which was given by one of the witnesses on the stand, and I felt that in order to clear the matter up it was proper for the other side to show what did transpire there. Of course, you have a right to take into consideration any claim made there,

Digitized by Google

or any testimony given there by witnesses, which differs from that given here, in order to determine what reliance you will place in the testimony of those witnesses, but outside of that it really has no bearing on this controversy."

Defendant did not take the stand in justice's court, and there was no proof of any claim or testimony by him, or any other witness, differing from that given in the circuit court, for the jury to consider. All that could be claimed for such testimony was that defendant had heard plaintiff testify to a matter of which he had knowledge, and did not take the stand to refute it. *Connell* v. *McNett*, 109 Mich. 329 (67 N. W. 344). These facts counsel for plaintiff had once distinctly proven without objection before he rested, and there had been no attempt by defendant to explain or deny them until plaintiff's counsel proceeded to renew the subject in cross-examination of defendant as to the justice's court proceedings. Defendant did not then deny those facts, although he did, by reckless and irresponsive retort, charge in extenuation that counsel opposed to him would not permit him to testify, or to "talk half the time," and "ruled the court that day." He finally admitted he did not know of any refusal. Just how far a cross-examination of this kind, drifting into a controversy between counsel and witness as to each other's veracity and propriety of conduct on a former trial of the case in justice's court, should be permitted to go, may be conceded as largely a matter of discretion with the trial court; but to permit other witnesses who were present in justice's court to be called and testify upon that issue is a more serious question.

It certainly was not material or competent to call the justice to vindicate himself. While defendant recklessly, and manifestly to his own prejudice, had by unseemly retort accused counsel of preventing him from testifying in his own behalf in justice's court,

Digitized by Google

he had contradicted himself and negatived his excuse by also testifying that he, in fact, had no knowledge of being refused the privilege of taking the stand, either by court or counsel. The material facts, for proof of which plaintiff's counsel claimed the right to go into the justice court proceedings, had not only been proven by him without dispute before the cross-examination began, but when it ended had been testified to by defendant himself. The testimony of the justice did not go to prove or disprove any issue on trial. Its tendency, beyond proving what was already admitted, was to divert the attention of the jury to an immaterial issue, and confuse it with the real question for them to decide, which was the agreement as to plaintiff's employment, and what, if anything, was yet due to him upon it. It is elemental that a jury, in trying an appeal case, may not consider or be influenced by the previous trial, and its result in the court from which appeal is taken, and it is therefore improper to show, or discuss before them, how the case was there decided, or who appealed it.

While there is no direct testimony by any witness in this case as to the result in justice's court, or who appealed, the prominence given the proceedings in that court in the trial under consideration inevitably, if indirectly, furnished to the most obtuse listener a clear understanding of who appealed and why. Although the court very properly cautioned the jury to dismiss from their minds all matters relating to the previous trial of the case, and seek to reach an independent conclusion, it was in connection with an expression of personal views as to the statutory right of appeal, which tended to shadow the defense with a prejudicial inference.

We are convinced that these prejudicial matters above referred to, in combination, had a tendency to and did influence the verdict of the jury and militate

Digitized by Google

against the exercise of an unbiased judgment, resulting in a failure to carefully confine their deliberations to an analysis of the testimony bearing upon the real issue in the case. A verdict for the entire amount claimed in plaintiff's bill of particulars is not warranted by his own evidence.

It is undisputed that plaintiff was hired as a farm hand at $45 a month, with a house in which to live, and began work on January 7th. The only dispute touching the terms of his hiring is over his claim that his hours of labor were fixed, which defendant denies. He testified that defendant was absent when he began work, and at the foreman's request he worked over hours; that the matter ran along in that way for about 2 weeks, when defendant returned, and plaintiff spoke to him about it, "to see what the agreement was," and defendant then promised him 15 cents an hour for extra time, which was also denied. He was paid on the 1st and 15th of each month by check, accompanied by a slip stating what the check was for, and showing any deductions made for coal or other items furnished him for household use. No mention was made on these slips of overtime, and plaintiff testifies nothing was said about it when he received them with his checks. He states that he worked at general farm work from January 7th to June 6th, when he went on the milk wagon to learn the route, and on June 13th started delivering, continuing in that service until his employment terminated, receiving $50 per month and a commission on bottles returned as wages. It is undisputed that when he went upon the milk route it was agreed between him and defendant that should he desire to leave, he would give 2 weeks' notice of his intention to quit, and $20 should be held back from his wages as security for performance, and, on the other hand, in case defendant desired to discharge him he should have 2 weeks' prior notice. No 2 weeks'

Digitized by Google

notice was given by either party before plaintiff left, and whether he quit voluntarily or was discharged was an issue in the case. He admitted on cross-examination that, with the exception of overtime claimed and the $20 held back, he had been paid in full for his services up to July 1, 1913. He claimed according to his bill of particulars, and recovered in full for, 4 hours daily at 15 cents per hour during 24 days in January, 28 days in February, 31 days in March, 30 days in April, 31 days in May, and 12 days in June, being every day from the time he commenced until he began driving the milk wagon. His own testimony discloses that a portion of the time for which he charges defendant was devoted to eating his meals. While he first testified that his regular wages were changed from $45 to $50 per month when he commenced upon the milk route on June 13th, on being confronted with statements and checks given him on pay days, he admitted, without explanation, that the terms of his hiring were changed on May 1st to the extent, at least, of an increase in his wages from $45 to $50 per month. In any aspect of the case, irrespective of the overwhelming testimony that he did not each day of the time claimed work the length of overtime claimed, this verdict was excessive, and in part unsupported by any competent testimony.

For the foregoing reasons, we are impelled to the conclusion that prejudicial error is manifest in the record of this trial, and the result cannot be sustained. The judgment is therefore reversed, and a new trial granted.

BROOKE, C. J., and KUHN, STONE, OSTRANDER, BIRD, and MOORE, JJ., concurred.

The late Justice MCALVAY, who sat in the case, took no part in this decision.

Digitized by Google

BRIN *v.* MICHALSKI.

1. SPECIFIC PERFORMANCE—LAND CONTRACT—TENDER—EVIDENCE.
   In an action for specific performance of a land contract, evidence by complainant, that, on a certain date within the time limited in the contract, she, in presence of defendants, counted out the money to defendants' attorney, and requested him to make out the necessary papers; that he offered the money to defendants and explained to them what it was for and complainant's purpose in tendering it to them; that they refused to accept it, and repudiated the contract on the ground that they had been offered more money for the property, corroborated by defendants' attorney and another witness who was present when the offer was made, is sufficient to establish the fact that tender was timely made, and complainant not in default in any respect, notwithstanding defendants' denial of the offer.

2. SAME—ADEQUATE REMEDY AT LAW.
   A decree for specific performance of a land contract will be affirmed, even though complainant has an adequate remedy at law for damages.

3. SAME—LAND CONTRACT—POSSESSION—VALIDITY.
   It is no objection to the validity of a land contract that a stipulation as to possession is omitted from its provisions, as the law provides that possession remains with the vendor until full performance and receipt of deed by the vendee.

4. SAME—LAND CONTRACT—DEFINITENESS—PROVISIONS.
   While provisions as to defeasance, insurance, repairs, and payment of taxes might properly have been included, they are not essential to the validity, or decree for specific performance, of a land contract, where said agreement is definite as to parties, property, consideration, terms, and time of performance.

5. ASSIGNMENTS—LAND CONTRACT—RIGHT OF ACTION.
   The assignee of a vendee's interest in a land contract, which contained no restrictions against selling and assigning his rights thereunder, succeeded to all his rights and could

Digitized by Google

sue in her own name for specific performance, or, if performance was impossible, for damages.

6. VENDOR AND PURCHASER—LAND CONTRACT—OWNERSHIP OF LAND SOLD—VALIDITY—DAMAGES.

A land contract would be equally valid if the vendor had no title to the property nor ability to secure one, though, if the latter were shown, the only remedy would be an action for damages.

7. SPECIFIC PERFORMANCE—EVIDENCE—ABILITY TO PERFORM.

Where the evidence shows that it is within the power of defendants to perform, a decree for specific performance of a land contract will be affirmed, although they do not hold legal title to the property.

Appeal from Wayne; Mandell, J. Submitted June 22, 1915. (Docket No. 96.) Decided September 29, 1915. Rehearing denied December 22, 1915.

Bill by Frances V. Brin against Dominik Michalski and another, for the specific performance of a land contract. From a decree for complainant, defendants appeal. Affirmed.

Beckenstein & Wienner (*William Friedman*, of counsel), for complainant.

August Cyrowski, for defendants.

STEERE, J. This bill was filed to compel specific performance of the following land contract which complainant holds as assignee through mesne conveyances from the original contractee:

"$50.00 DETROIT, MICH., June 19, 1912.

"Received of Sam Feldman the sum of fifty dollars, being part payment of purchase price of five thousand four hundred ($5,400.00) dollars for house and lot situated Nos. 347 and 349 north side of Alexandrine Avenue E., Detroit, Michigan. The balance of five thousand three hundred and fifty ($5,350.00) dollars to be paid as follows: The above-named Sam Feldman is to pay nine hundred and fifty ($950) dollars within

Digitized by Google

thirty days from date hereof, and receive a land contract for the payment of one thousand dollars, which includes the above payment, and the balance of four thousand four hundred ($4,400.00) dollars within five years from the date of the land contract, in semi-annual payments of $100.00 or more, to apply on the principal, with interest thereon at the rate of six per cent. per annum, payable semi-annually. The undersigned Dominik Michalski and Anna Michalski, his wife, are to mortgage the above-described premises for the sum of two thousand one hundred ($2,100.00) dollars.

"DOMINIK MICHALSKI,
"ANNA MICHALSKI,
"Owners.
"SAM FELDMAN,
"Purchaser.

"In presence of B. F. Domzalski."

The bill alleges tender of full performance by her within the time limit, demand for performance by defendants and refusal on their part, makes proffer to deposit the stipulated price with the court, and asks:

"That the said defendants, Dominik Michalski and Anna Michalski, may be decreed to execute, acknowledge, and deliver to your oratrix a good and sufficient land contract of said described premises, in accordance with the terms and conditions in said contract mentioned and set forth, accept and receive therefor the sum of five thousand four hundred dollars ($5,400) in the manner specified in the aforesaid contract, and that your oratrix may have such other and further relief as the nature of this case may require, and as shall be agreeable to equity and good conscience."

Defendants' answer denies that any offer of performance or tender was ever made them within the time specified in the contract by complainant or any one in her behalf, avers that all matters of complaint alleged in said bill are triable in an action at law, and therefore claims the benefit of a demurrer, and asks that her bill be dismissed.

Digitized by Google

The contract was drafted by Mr. Domzalski, an attorney who represented defendants in the transaction and signed as subscribing witness. After preparing the instrument he read it to them, translating and explaining its nature and terms to them in the Polish language, which they best spoke and understood. They expressed themselves as satisfied, accepted the first payment of $50 from Feldman, and signed the agreement. No claim is made of inadequacy of price, fraud, undue advantage, or misunderstanding, or that the instrument failed in any particular to express the terms of the bargain as made.

Feldman soon sold and assigned his contract to one Leon Van Vliet, at the same time giving with the contract a quitclaim deed of his interest in the property described in it. Van Vliet shortly thereafter in like manner assigned the contract and quitclaimed his interest to complainant, Frances V. Brin, his sister. Defendants had some time previous purchased this property with deferred payments, and held it by a land contract from one Anton Skotzke, who yet had the fee title, subject to their contract, upon which payments had been regularly made and which was not in default. Their contract from Skotzke contained no restrictions against selling and assigning their rights under it, nor any obstructing provisions which would prevent them from carrying out the terms of their contract with Feldman.

The case was heard upon pleadings and proofs taken in open court. On conclusion of the hearing the trial court rendered a decree granting specific performance of said contract according to its terms and as prayed for in complainant's bill.

The substance of the testimony introduced by complainant is that on July 12, 1912, she called up defendants, accompanied by a Mr. Zack, who knew the parties and was present in Domzalski's office when they gave

Digitized by Google

the contract to Feldman, and talked with them about the contract, telling them she proposed to buy the property; that Michalski replied it made no difference who bought the property, and it was all right; that she soon thereafter, on July 17th or 18th, called upon defendants at their home to pay them the $950 which the contract provided should be paid "within thirty days from the date hereof," and upon being informed of her mission, they told her to go to their lawyer, Mr. Domzalski, which she did, and there met with him and them in his office; that she told him to make out the necessary papers and counted out to him the full amount of $950 as payment upon the contract, which he then offered to defendants, explaining fully to them what it was for, her purpose in tendering it to them, and her request that they comply with the terms of the agreement. They refused to accept the tender, and repudiated the contract on the ground, as she claims, that they were offered more money for the property. On July 19, 1912, she personally served written notice upon defendants, describing the contract and assignments under which she acquired Feldman's rights, stating that she was yet ready and willing to perform, desired to close the transaction at once, requesting that she be advised by July 24, 1912, whether they would accept payment and perform on their part. Upon their again refusing, this bill for specific performance was prepared and soon filed.

The only issue of fact raised by defendants' evidence was tender of payment within the contract time. They were the only witnesses in support of their denial of tender. Their testimony is so inconsistent, conflicting, and completely overwhelmed by distinct and direct evidence, both oral and written, to the contrary, as to call for little consideration. Finding no fault with the contract itself, and expressing themselves as ready to accept payment if offered within the specified time, and

Digitized by Google

in such case perform on their part, they testified that no offer of payment or tender of any kind was ever made them, although they waited in receptive expectation for months after the time had expired. Both testified that complainant did not come to their house and offer payment. Dominick stated she once "said she would pay next week, and I waited two or three months, and I got not a penny." His wife, Anna, the other defendant, testified that they waited for complainant until November; that they were told to go to their attorney's office to get their money on two different dates, July 18th and 24th, and went each time, but no one was there and they never got their money. Mr. Domzalski, their then attorney, does not represent them in this case, and declined to support their testimony, but, when called as a witness and interrogated, frankly confirmed the circumstances of the tender in his office as related by complainant, and Zack, who was also present in the office, testified that he saw the money laid on the table, heard complainant ask Domzalski to make out the papers and defendants' refusal, when the money was offered them, Michalski saying he was offered more money for the property. Defendants make no explanation or denial of the written demand received by them on July 19th, or their refusal in that connection. This bill was filed on August 24th, process served on them August 30th, and their appearance entered September 4, 1912. We fully agree with the conclusion of the trial court that tender was timely made, and complainant not in default in any respect.

Upon the legal aspect of the case it is contended, as obstacles to decreeing specific performance, that complainant has an adequate remedy at law; the terms of the contract are not certain and definite, and present no mutuality of consideration and remedy. Of the remedy it is sufficient to note that the subject-matter of this agreement is an interest in land, and

Digitized by Google

it does not depend upon the inadequacy of legal remedy. 36 Cyc. p. 552.

It is pointed out by counsel that this is not a contract to convey, but a contract to enter into a contract to sell real estate, and does not contain sufficient, definite, and certain provisions essential to directing specific performance of a contract of that nature, in the particulars that no mention is made of defeasance, insurance, repairs, payment of taxes, and, most important of all, possession.

As to the omission pointed out as "the most important agreement of them all" in a land contract, the law provides that, where such stipulation is omitted, possession remains with the vendor until full performance and receipt of deed by the vendee. *Druse* v. *Wheeler*, 22 Mich. 439; *Gault* v. *Stormont*, 51 Mich. 636 (17 N. W. 214); *Way* v. *Root*, 174 Mich. 418 (140 N. W. 577). While the omissions pointed out properly may be and often are guarded by express provisions in contracts for sale of real estate, as the conditions of the property and desire of parties may suggest, they are not essential to the validity or decree for performance of a contract. This agreement contains the essential elements of a contract, and is certain and definite so far as it goes. The parties, property, consideration, terms, and time of performance are clearly stated.

That complainant on receiving an assignment of Feldman's contract succeeded to all his rights and could sue in her own name for specific performance, or, if performance was impossible, for damages, there can be no question. 36 Cyc. pp. 758, 759. The agreement would be equally valid if the vendor had no title to the property nor ability to secure one, though, if the latter were shown, the only remedy might be an action for damages.

It is true in this case that defendants do not, or did not, hold legal title to the property, but they have the

Digitized by Google

legal right to acquire it. They not only plant their defense on other grounds, but it is shown to be within their power to obtain title and perform. They held the property under a land contract, the full consideration for which was $1,700, and upon which over $1,000 had been paid at the time of the hearing. A tender of $950 was made them by complainant under her agreement calling for a contract from them which might run five years, and under their contract with Skolzke they could pay him in full in 1913 and secure their title to the property.

We are of opinion that the equities of the case and the law entitle complainant to the relief granted.

The decree is affirmed, with costs.

BROOKE, C. J., and KUHN, STONE, OSTRANDER, BIRD, and MOORE, JJ., concurred.

The late Justice MCALVAY took no part in this decision.

VRELENICH v. CALUMET & HECLA MINING CO.

1. MASTER AND SERVANT—FELLOW SERVANT—TIMBER BOSS—SAFE PLACE.

Where an employee in defendant's mine, working under the supervision of a timber boss, was injured by the fall of some rock in one of the stopes immediately after a blast, and where it appeared that his work at this time was timbering the mine, replacing some of the timbers which had become displaced, and that the timber boss made an examination of the stope, before plaintiff entered after blasting out a piece of rock, and the boss found the

Digitized by Google

hanging wall apparently safe, but did not call the men in or assure them that the place was safe, that he was accustomed to call the men after he had examined the condition of the rock, if he found everything safe, and that plaintiff knew about the custom and rule, he was not entitled to recover for his injuries.

2. SAME.

It is now well settled that the duty to provide a safe place is not applicable to those engaged in the work of timbering: the employer's duty being fulfilled when he has promulgated reasonable rules and properly instructed the servants, furnished suitable tools, machinery and materials for the work and engaged competent men to perform it.

Error to Houghton; O'Brien, J. Submitted June 23, 1915. (Docket No. 31.) Decided September 29, 1915.

Case by Steve Vrelenich against the Calumet & Hecla Mining Company for personal injuries. Judgment for plaintiff. Defendant brings error. Reversed.

Allen F. Rees (*Rees, Robinson & Petermann,* of counsel), for appellant.

Le Gendre & Driscoll, for appellee.

STEERE, J. While an employee in defendant's mine, plaintiff sustained two distinct physical injuries in accidents occurring at different times and places. This action was brought to recover damages for both injuries, each being distinctly charged in a separate count of his declaration. The earliest injury, charged in the first count, occurred February 18, 1909, at which time a falling tram car broke plaintiff's left leg below the knee. On July 24, 1911, while working as a timberman on the fiftieth level of No. 4 shaft in defendant's mine, a fall of rock from the hanging wall bruised his shoulder and broke his right leg. The latter acci-

Digitized by Google

dent is the subject of the second count in his declaration, and of this appeal.

The trial court submitted the case to the jury upon both counts in the declaration, with instructions to pass upon each accident separately and determine whether defendant was liable in damages for negligence causing either or both of the injuries counted upon. A verdict of not guilty was returned for defendant upon the first count, and upon the second a verdict awarding damages was rendered in favor of plaintiff. No questions relating to the earlier accident, charged in the first count, are before the court for review. Defendant's assignments of error relate only to the second count charging negligence in connection with the accident of July, 1911, when plaintiff was working as a timberman helping to make places safe for mining operations, and the important question raised is whether the trial court erroneously denied defendant's motion, and requests for a directed verdict of no cause of action urged on the ground that plaintiff's evidence failed to make a *prima facie* case of actionable negligence.

At the time of the accident under consideration the timber gang to which plaintiff belonged, consisting of four men and the timber boss, were at work in a stope on the fiftieth level, replacing some timbers which had been knocked down in the night, during the shift before, by blasting. On the following morning, when the timbermen came to this stope, the timber boss devoted some time, assisted by his men, in examining the hanging wall and environments with a light on a staff and barring down any loose rock found, as a protection for their own safety before starting the timbering. The men then commenced to shovel away some dirt, or broken rock, from the foot wall where timbers were to be set, and while doing this found a large piece of rock too heavy for them to move, of the size and

Digitized by Google

kind called a "block hole," which it is customary to break finer by blasting or otherwise. The miners working in the stope near by were called upon to reblast this rock, so the timbermen could get it out of their way. This was done, the timbermen withdrawing together to a selected place of safety when the block hole was ready to blast, where they seated themselves and all waited until the blast was discharged and the smoke cleared away, after which the timber boss started first and went into the stope, where, as he testified, he made an examination of the hanging wall and vicinity in which the timbering was to be done, finding it apparently safe. The first to follow him was a timberman named Andrew, plaintiff's working partner, who went into the stope and had just begun work, having moved two or three shovelfuls of dirt, when plaintiff followed and joined him, also starting to shovel and some rock fell upon him from the hanging wall, inflicting injuries as before indicated. The timber boss, who was a short distance beyond them in the stope, had not then called the men to resume work, nor given any assurances that the place was safe, neither had he given any warning of danger. Plaintiff testified:

"It was our custom there, when there was a blast, for the timber boss to go in first and look the thing over. The timber boss always went first. When he thought it was all right he used to call us. * * * I didn't hear anybody call us into the stope that day."

Plaintiff was a man 52 years of age, experienced in copper mining operations. He first worked for defendant 14 years prior to the time of the trial, and stated that he worked in its mine as a trammer for 8 years before his first injury, during 2 years of which time he was a "$5 boss," but ceased to be a boss about a year before he was hurt. His explanation of the nature of his employment when injured, and the man-

Digitized by Google

ner in which underground operations were conducted, indicates intelligent understanding of and familiarity with the mining business and its dangers. Of conditions and methods he testifies in part as follows:

"My job this time was timberman. Timbermen are putting up timber, so they can get the rock out of that stope. I was hurt this time on the fiftieth level. * * * The vein in these mines lays between two walls of rock running down on a slant like that, about 38 degrees. The upper wall we call the hanging wall, and the bottom wall the foot wall. In taking out this rock they run a drift in the vein a certain distance and then work the rock out from the bottom. The stope was as long as 75 feet; that is, they block off 75 feet of the vein, and start to take that 75 feet up. The miners start in one place and go across the vein. They take out a layer right near the level first. That's what they call a cut. After that's taken out, they take another slice. After they go up, it's the timbermen's duty to follow them up and put these timbers in, so as to keep the hanging wall from coming down. That is right. The day I was hurt the stope had gone up about 50 feet. The timbermen had followed it up. They were after the miners. I think they had timbered the stope about 40 feet where we were working. At this place we were not very near to the miners. Some places they were as close as 4 feet, if they can catch up to the miners. * * * Those timbers are put in together some places 6 feet, and other places 8. They put timbers up in a stope of that kind to hold the hanging up, and so it won't come down. That's to make it safe for the men going up and down in the stope, so they can work. Just that time on the day I was hurt we were cleaning the dirt. That's part of the work of putting in the timber. We clear the dirt first before we put in the timber. By cleaning the dirt, I mean the timber is always put on the solid foot, not on the dirt. They don't cut hitches there, they just clear the dirt and set the timbers on the wall. I have been working at this timberman's job about 16 months before I got hurt, 16½, something like that. There were four men and the boss the fifth in our gang. * * * After a blast of that kind, it was the duty

Digitized by Google

of the timber boss to go in and take a look at the hanging, to see if it was all right; but I don't know if he did this time or not. He usually did. I saw him do it at various times. I saw him other days. The way they inspect the hanging wall is to put a light on the end of a staff, so they can get the light close to the hanging wall. If the boss sees something that doesn't look very good to him, he tells us to get away and pinches it down. Sometimes, when he can't do it alone, he calls for help. I mean, if he can't pinch it alone. * * * After the blast I didn't hear whether the boss asked Andrew to go up with him. I didn't hear anything. The timber boss didn't talk to me before he went up after the blast."

Under the testimony as to rule and custom, showing it was the duty of the timber boss in this mine to look out for the safety of the men under him, to give warning, inspect and direct, bar down loose rock from the hanging wall, etc., it is contended in plaintiff's behalf that his contract of hiring imposed upon defendant the nondelegable duty to furnish him a safe place at its peril, and the negligence of the timber boss, acting as vice principal, and imputable to defendant, was, under the evidence, an issue of fact to be submitted to the jury.

The duties of this timber boss in caring for the safety of his crew, while emphasized in the evidence and urged as imposing upon defendant the nondelegable duty of furnishing a safe place, are not, in their nature and as applied to the work in which he with his men was engaged, shown to be other or different in principle than those of timber bosses generally.

The timbermen's work is directed to making places in the mine safe, which, as they entered upon their work, are unsafe or uncertain. Plaintiff was an experienced timberman. He assumed the known risks of the employment, and knowing the rule, as he states it, for the boss to go first after a blast, and call the men if it appeared all right, he did not wait for a call, and

Digitized by Google

went into the stope without any orders or assurances of safety. In this particular there is a marked distinction between the instant case and *Danula* v. *Mining Co.*, 166 Mich. 350, 361 (130 N. W. 604), *Minkkinen* v. *Mining Co.*, 169 Mich. 279, 282 (135 N. W. 449), and *Scendar* v. *Copper Co.*, 169 Mich. 665, 666 (135 N. W. 951), cited and relied upon in plaintiff's brief as controlling in principle here. In each of those cases the plaintiff was assured by some one of experience and in authority over him that the place was safe, and ordered to begin or continue work there. Whatever uncertainty may have at one time arisen as to the scope of those cases, it is now made clear that the general rule announced in *Petaja* v. *Mining Co.*, 106 Mich. 463 (64 N. W. 335, 66 N. W. 951, 32 L. R. A. 435, 58 Am. St. Rep. 505), is unmodified. See, also, *Andrews* v. *Mining Co.*, 180 Mich. 72 (146 N. W. 394); *Kaaro* v. *Mining Co.*, 178 Mich. 661 (146 N. W. 149); *Zap* v. *Mining Co.*, 184 Mich. 437 (151 N. W. 554); *Juntunen* v. *Mining Co.*, 184 Mich. 341 (151 N. W. 571).

The facts in the latter case are similar in many respects to those before us. Juntunen was working in defendant's mine as a timberman, engaged with others of his crew in repairing old timbering a short distance from No. 2 shaft on the forty-seventh level, and suffered a broken leg from a fall of rock. His testimony was to the effect that the duty of inspecting for danger and caring for the safety of the workmen rested upon the captain and timber boss; that he relied upon their assurances that the place was then safe and worked there as directed. The doctrine of safe place and vice principal was invoked there, as here. It was held that, as the undisputed evidence showed plaintiff was, at the time of his injury, engaged with other members of the timber crew in making repairs "for the purpose of making safe that which had theretofore been ren-

Digitized by Google

dered unsafe through the crushing in of the shaft," a verdict should have been directed in favor of defendant.

With these timber gangs moving from place to place in the mine, engaged in the work of making places safer for mining operations, it is now well settled that the doctrine of safe place is not applicable to such employment, and the employer's duty is fulfilled when reasonable rules are promulgated, the workmen properly instructed, suitable tools and material furnished for the work, with competent men to perform it. The custom or rule that the timber boss should first go into the place where a blast was fired, inspect conditions, and notify the other timbermen did not constitute him a vice principal. His general status and relation to the other timbermen of his crew, as shown in this case and others of like nature, is well stated by Andrew, plaintiff's partner, as follows:

"The timber boss is an ordinary timberman, with a timber gang of four or five men. He does the same kind of work that the other timbermen do, only he has the say as to where the timber shall go in; that is what the timber boss is. All of the timbermen are supposed to keep their eyes open, and if they see a bad hanging to take care of it by putting in timbers; that is the entire work of a timberman."

For the foregoing reasons, and under the precedents referred to, we are constrained to conclude that this judgment must be reversed, and no new trial granted.

BROOKE, C. J., and KUHN, STONE, OSTRANDER, BIRD, and MOORE, JJ., concurred.

The late Justice MCALVAY took no part in this decision.

Digitized by Google

PEOPLE, *for use of* NEW JERSEY TERRA COTTA CO., *v.* TRAVES.

1. EVIDENCE — CUSTOMS AND USAGES — WRITTEN CONTRACT — PERFORMANCE OF CONTRACT—SET-OFF AND RECOUPMENT.

In an action by a terra cotta company for the price of material furnished to a contractor for use in the construction of a school house, wherein the contractor sought to recoup damages because the terra cotta did not comply with the requirements of the contract, where it is conceded that the work as furnished was different from that shown in the architect's original plans, evidence that plaintiff prepared detail and working plans which were submitted to the architect, changed in some particulars, and finally approved by him; that a general custom prevailed to send the architect's plans to terra cotta companies and have them adapt their construction to the architect's design, as shown by his plan; that defendant had knowledge of this custom, and that the parties contracted with reference thereto, was not incompetent as tending to vary the terms of a written contract, but, under proper instructions, was properly admitted for the purpose of presenting to the jury the issue as to plaintiff's performance and defendant's recoupment.

2. PRINCIPAL AND SURETY—STATUTORY BONDS—NOTICE—SCHOOLS AND SCHOOL DISTRICTS.

Although Act No. 187, Pub. Acts 1905, § 2, requires the subcontractor to give notice in writing to the board or officers that he relies upon the security of the bond of the principal contractor before payment is made, whereupon he shall acquire the benefit of the security given by the principal contractor, it is *held*, in an action by a subcontractor against the surety on a statutory bond for the construction of a school house, that notice served on the school board after part of the material had been paid for, but while there was still due to the principal contractor on the general contract more than was owing to the subcontractor, was a sufficient compliance with the act.

3. SAME—DEFENSES—ACTUAL INJURY.

Defendant company, being surety for profit, could not

Digitized by Google

benefit by plaintiff subcontractor's failure to give timely notice under Act No. 187, Pub. Acts 1905, § 2, where said surety has neither alleged nor proved any actual injury to it from such failure. *People* v. *Bowen*, 187 Mich. 257.

Error to Wayne; Van Zile, J. Submitted June 28, 1915. (Docket No. 54.) Decided September 29, 1915.

Assumpsit by the New Jersey Terra Cotta Company, in the name of the people of the State of Michigan, against William H. Traves, principal, and the Fidelity & Deposit Company of Maryland, surety, on the bond of Traves as contractor for the construction of a school house. Judgment for plaintiff. Defendants bring error. Affirmed.

Donnelly, Lyster, Brennan & Munro, for appellants.

George F. & Peter J. Monaghan (*John C. Shea*, of counsel), for appellee.

STEERE, J. On May 26, 1910, William H. Traves entered into a written contract with the Detroit board of education to furnish material and do the mason work in the construction of a certain high school building in said city. As required by Act No. 187, Pub. Acts 1905, he furnished a bond, with his codefendant, the Fidelity & Deposit Company of Maryland as surety, to pay—

"any subcontractor or by any such contractor or subcontractor as the same may become due and payable of all indebtedness which may arise from said contractor to a subcontractor or party performing labor or furnishing materials, or any subcontractor to any person, firm or corporation on account of any labor performed or materials furnished in the erection, repairing or ornamentation of such building, improvement or works." Section 3.

The plans and specification of this contract called for the use of a quantity of architectural terra cotta

Digitized by Google

as a part of the masonry. This Traves bought from the New Jersey Terra Cotta Company, a corporation, of Perth Amboy, N. J., for the benefit of and, in effect, by which this action was brought, contracting to pay therefor the sum of $11,680. The terra cotta company, called plaintiff herein, furnished the material as required, which was used in the building. It is claimed, however, that when and as furnished it was not in the condition contracted for, and Traves was put to much trouble and extra expense on that account, for which notice of recoupment is given under a plea of the general issue.

It appears to be conceded, and the court so instructed the jury without objection, that upon this contract for terra cotta Traves was in default and owing plaintiff the sum of $9,350.45, including interest, at the time the case was tried, provided plaintiff had fully performed on its part. A verdict was rendered against both defendants for $9,350, and judgment entered accordingly.

The case as presented by the pleadings and proofs involved two issues, one between plaintiff and the defendant bonding company only, in which the latter denied plaintiff's right of recourse to the bond, because it failed to give timely notice, as required by said Act No. 187, that it relied upon such security; the other being primarily between plaintift and Traves, but an available defense for the surety also, in which it was denied that the material furnished, for the price of which this action was brought, complied with the requirements of the contract. Most of the evidence introduced and time consumed at the trial were devoted to the latter issue.

Traves received from plaintiff all the architectural terra cotta contracted for and used it in the high school building. The material and manner of using it in the

Digitized by Google

construction proved satisfactory to the architects in charge, and both were accepted. Traves contended, however, that the material was not "in accordance with plans and specifications made by Malcomson & Higginbotham, architects," as his contract with plaintiff provided it should be. The terra cotta was designed to be used chiefly for cornice work, and it is claimed the architects' plans show not only the general design of the cornice and kind of material, but the manner of construction, including size and shape of the terra cotta pieces, or blocks, indicating a comparatively small number of large blocks, simple, easy, and inexpensive to set in the wall, while that furnished consisted of a large number of small blocks, not economically fit or convenient for such construction, which caused a large amount of extra labor, delay, and expense to Traves in overcoming the difficulties this occasioned and properly setting the many small pieces. For the extra expense this imposed he claimed and sought to recover under his plea of recoupment $6,999.82, including interest. Upon this issue, conceding "that the question of whether the material furnished complied with contract was one for the jury, if all testimony objected to was properly admitted," counsel for defendants contend that it was not, and that upon this issue there is reversible error in the admission of incompetent testimony tending to vary the terms of the written agreement.

The contract between plaintiff and Traves for this material was in writing, evidenced by a proposal dated June 21, 1910, directed to and accepted by Traves. It provided, amongst other things, that the terra cotta plaintiff agreed to furnish would be "in accordance with the plans and specifications made by Malcomson & Higginbotham, architects."

Through its local agent in Detroit plaintiff had been in communication with Traves some time before he

Digitized by Google

secured his contract with the board of education, and from a copy of the plans furnished it had made him an estimate of the cost of the indicated terra cotta, with sketches showing the design carried out in construction. His contract with the board was signed in May, 1910, at which time he furnished the board an estimate showing in detail how he arrived at the price of $75,880, for which the contract was let to him. His estimated cost of the terra cotta was $11,670, and for setting same $732. On June 21, 1910, he visited plaintiff's office in New York, taking with him copies of the plans and specifications, and went over the matter with plaintiff's president, Mr. Eskeson, as a result of which the written proposal before mentioned was made and accepted.

It is contended by defendants that what was said between the parties on that occasion was erroneously admitted in evidence, as well as other testimony relative to these plans, because it tended to modify or change them and with them the written contract of which they formed a part. These general plans of the building, of which both parties had copies before them, indicated for use in the terra cotta cornice longer and larger blocks than those actually used in the construction, showing them laid upon the wall so as to project over both sides. Mr. Higginbotham, the architect, testified, against objection, that those places did not particularly show the construction—"more the design and size"—and that the indication of large blocks extending the full width was an error in drafting, as terra cotta work was not generally constructed in that way. It is conceded that the original plans were not followed in that particular. The outward design and size of the cornice was the same, but smaller and thinner blocks of terra cotta than indicated on the general plan were used, which did not project into the wall its full width, being braced and held by metal supports.

Digitized by Google

Against this preserved objection that it tended to change or modify the terms of a written agreement, and was therefor incompetent, plaintiff was allowed to introduce a line of testimony by the architect, and others who qualified as experts, that it is the general custom in connection with such building contracts to send the architect's plans to terra cotta companies, and such other companies having subcontracts for special material, and have them adapt their construction to the architect's design, as shown by his plans, they furnishing the detail drawings and working plans, and that such course was followed in this case; that details and working plans were prepared by plaintiff, submitted to the architect, changed in some particulars according to his directions, and finally approved by him before the terra cotta was made and shipped to Detroit. Of this he testified:

"They make the setting plans and they take our design. * * * The expert terra cotta men could do it, but we do not propose to, and we never attempt to do it. We show the design. * * * The details are furnished to us and must conform to the scale drawing on which our bids for the work are based."

He further testified that the detail plans from the terra cotta company simply were put in better shape than the general plans, and were approved by him as architect. The president of the company with whom Traves closed the deal in New York was allowed to testify to the general custom and Traves' knowledge of it, and that the matter was all gone over by them and the contract made with reference to it, saying in part:

"I went over with Mr. Traves the drawing and our sketches. I showed him how we made our sketches. I went over that very thoroughly, and I explained to him what was the custom in terra cotta; that we figured the usual terra cotta construction all the time on our drawings and would ask to have our construction approved."

Digitized by Google

In *Karwick* v. *Pickands*, 171 Mich. 463, 471 (137 N. W. 219), the rule as to custom is stated as follows:

"It is said that all trades have their usages, and, when a contract is made with a man about the business of his craft, it is framed on the basis of its usage, which becomes a part of it, except when its place is occupied by particular stipulations."

Counsel for defendant plants his contention upon the proposition that the construction adopted was different from that shown on the architect's plans and in violation of the express stipulation that the terra cotta was to be "in accordance with the plans and specifications" of the architect. The specifications of the architects under the subheading "Terra Cotta" provide, amongst other things, that "all the details are to be approved by the supervisor and architect." It is also to be noted in connection with the question of understood manner of construction that the agreement also specifies:

"This contract does not include iron anchors or supports."

We think that this testimony tending to show a general custom, known to both contracting parties who made their agreement with reference to it, was competent. This line of testimony was introduced to meet defendant's claim of recoupment under the charge that the material did not conform to the contract. Traves testified that the contract was not made with reference to any custom, that he knew of no such custom, and relied upon the general plans with reference to which he contracted, under which the construction was easier and cheaper; that when the contract was made in New York there was no talk with Eskesen about getting out working plans, only he said they would have the architect furnish details as soon as possible. His own letters show that ten days later he wrote Eskesen from Detroit:

Digitized by Google

"Send on working drawings to be approved by architect."

On July 18th he again wrote:

"Send along working drawings so I can get them approved by the architect and return to you."

On July 23d he wrote plaintiff:

"Just as soon as you send drawings and samples will have them examined and sent back."

They were sent August 22d, and the architect testified that Traves delivered them to him for approval, stating what they were, with a request that they be examined and approved. On August 29th Traves wrote plaintiff:

"Received your letter and drawings for terra cotta on Cass high school and gave them to architects and your letter, and they have answered all questions in letter as you will see, and marked on plans."

Whether there was a custom, its nature and Traves' knowledge of it, and whether the parties contracted with reference to it, were questions opened to inquiry by the conflicting testimony, which fairly raised an issue for the jury, under the rule stated in *Pennell* v. *Transportation Co.*, 94 Mich. 247 (53 N. W. 1049). This was not precluded by the stipulation relative to plans, and the general plans furnished, for specifications also were equally binding, and details to be approved by the architect were required by the specifications. This is in harmony with the custom sought to be proved in explanation of the contract, rather than in exclusion of it. We find no error in admission of the testimony complained of or the charge of the court, which fully submitted to the jury, with a clear statement of the conflicting claims of the parties, this whole question of plaintiff's performance of the contract and

Digitized by Google

Traves' plea of recoupment, under proper instructions as to applicable rules of law for the jury's guidance.

It is further urged that the court erred in denying the motion made in behalf of the defendant surety company for a directed verdict as to it on the ground that plaintiff failed to give timely notice that it relied upon the security of the bond in compliance with section 2 of said Act No. 187, which provides as follows:

"In the case of a subcontractor, he shall give notice in writing before payment is made for the work or materials furnished by him to the said board of officers or agents, that he is a subcontractor for the doing of some part of such work which he shall specify in his notice and that he relies upon the security of the bond by this act required to be given by the principal contractor, and that in the case of the giving of such notice to the said board of officers or agents said subcontractor shall also notify the principal contractor that he has done so, and whenever this shall have been done, the said subcontractor shall be entitled, subject to the rights of the persons with whom he has contracted for labor and materials, to the benefit of the security given by the principal contractor, and to be subrogated to the liens of the persons who have performed labor or furnished materials."

The title of this act is "to insure the payment of subcontractors and wages earned and materials used in construction, repairing or ornamenting public buildings and public works." It is to be noted that of those to whom payment is proposed to be insured section 2 only applies to subcontractors. No notice is required of laborers and materialmen. The object of the act is declared by its title to be to insure payment of all classes mentioned. The object of section 2 leaves much to conjecture. If this classification and these requirements were intended to protect the surety, as defendant claims, it would seem that either the act would require notice to be served upon the surety, or impose some duty on the municipal board or contractor,

Digitized by Google

who are notified. It does neither. Just what protection this section might afford the surety, beyond a technical defense in case the subcontractor forgot to serve the notice, is far from plain.

On August 14, 1911, plaintiff wrote the board of education, giving notice of its claim and requesting that it be retained out of any payments due Traves under his contract, but this notice was not in all particulars as specified in said section 2, and on October 11, 1911, a proper notice was served with special reference to the statute. At the time of the second notice there was yet coming to Traves upon his contract with the board over $15,000, but it is contended by defendant that the proof of estimates and payments made to Traves show he had finished the terra cotta work and received payment for it, less 15 per cent. retained until final payment on the contract, before this notice was served. Traves' contract provided for payment to him on the 15th of each month as follows:

"Within 15 per cent. of the sum which the said board of education shall determine to be a safe relative estimate of the value of the work done during the preceding month. The said estimates shall not be required to be made by such calculations, but may be arrived at approximately according to the judgment of the said board. It is expressly understood that such estimate shall only be made at the pleasure of said board, and no estimate shall be deemed an acceptance of the work on which it is made."

Under this Traves received his first estimate July 28, 1910, and on May 8, 1911, his ninth estimate. No portion of the retained 15 per cent. was paid him until after the second notice was served. His last payment of the entire balance due under the contract was received May 23, 1912. Estimates of work done upon the building were made up by the superintendent of buildings and furnished the board as a basis for allowance of partial payments. These were prepared by

Digitized by Google

Mr. Geering, then superintendent of buildings, who was not living at the time this case was tried. In making up his estimate he itemized the amounts against various parts of the work according to their degrees of completion, and then either figured the total value of work done since the previous estimate, less 15 per cent., or the total done from the beginning and its value, less the retained percentage, and found the amount of the proposed estimate by deducting previous payments. It may be conceded, as contended by defendant, that his estimates upon which payments were made include the value of the terra cotta work completed before the notice in question was given, less 15 per cent. The Traves contract with the board, however, required no separation of the different kinds of work. The estimates by the board upon which payments were to be made, were its determination of a safe relative estimate of the value of the work done, which might "be arrived at approximately according to the judgment of the board," at the pleasure of the board, "and no estimate to be an acceptance of the work on which it is made." In making its estimates and payments the board treated the contract as an entirety, and the records showed the payments made "on account of the contract." Neither the contract nor Act No. 187 require any schedule to be filed or estimate furnished as to any particular part of the work done and proportionate payment. It is conceded that when the notice was filed 15 per cent. of the cost of the terra cotta work was not paid, and it is shown that more than its total cost was yet unpaid upon the contract as a whole.

Under such a state of facts the provision of section 2 that notice shall be given "before payment is made for the work or materials furnished" is difficult of application. It was certainly not paid for in full; no direct payment was applied upon it. In payments upon

Digitized by Google

the contract as a whole, of which the terra cotta work was a part, the latter was necessarily paid in part. The act makes no provision for prorating surety liability.

In a case of this kind, where defendant is not entitled to notice, and the purpose of the notice is not made clear by the act, some consideration may be given to the general statement in *Ridgeway* v. *City of Escanaba,* 154 Mich. 68 (117 N. W. 550), that this court has "been inclined to favor a liberal construction of statutes requiring notice of claims." The contract of surety contains no condition or stipulation for notice upon any one. The condition of the bond is that Traves shall pay as the same may become due "all indebtedness which may arise from said contractor to the subcontractor, or party performing labor or furnishing material," etc., and section 4 of said Act No. 187 in plain language gives the right to bring an action on this bond to "any person, firm or corporation to whom any money shall be due and payable on account of having performed any labor or furnished any materials." This, without qualification or condition, gives all contemplated in the title of the act a right of action on the bond, with only the two conditions that the State shall not be liable for costs, and, in case of a subcontractor, he shall be required "to allege and prove that he has paid to all parties entitled thereto the full sums due to them for labor or material contracted for by him."

This condition suggests the query whether, in treating subcontractors as a special class, the legislative intent was directed to those only who contracted to assume and engage in a portion of the actual work of erecting the building upon the premises, rather than to those who under a contract of sale simply furnished to the principal contractor a commodity to be used by him in his contract. Under its contract plaintiff had

Digitized by Google

no direct connection with the erection of this building. It only sold to the contractor material of the kind it dealt in, manufactured in another State and shipped to him for use in his contract. In a sense every person who sold Traves any material for use in construction of the building and every laborer hired upon the job was a subcontractor. The only intimation, if such it be, given of where the lawmakers intended to draw the line is the condition in section 4. The title of this act is "to insure the payment of subcontractors," however classified, as well as laborers and materialmen, and section 3 of the act is plain and positive as to the conditions of the bond, which make no mention of notice, but, conceding that the bond given under the statute includes and is to be tested by all provisions of the statute, that plaintiff is a subcontractor in contemplation of section 2, required to give notice as provided, and that said section was for the protection of all interested, including the surety, and that, if damnified by failure or delay in giving notice, the surety is entitled to avail itself of the statutory provision, we find it alleged and proven that the statutory notice was given before the terra cotta was fully paid for, even under defendants' theory, and at a time when there yet remained due or to become due to the principal contractor much more than sufficient to satisfy plaintiff's claim. The only contention against complete compliance with the statute is that there was partial payment before notice. No statute in any other State is discovered containing a provision analogous to section 2 of said act. Counsel for defendant cite as similar a statute of the State of Washington requiring a surety bond from contractors on public works for completion of the work contracted for and for the protection of laborers and materialmen, which provides that:

"Such persons shall not have any right of action on

Digitized by Google

such bond for any sum whatever, unless within 30 days from and after the completion of the contract with and acceptance of the work by the board," etc., the claimant file a prescribed notice with such board or public body, "and said notice, after being presented and filed, shall be a public record open to inspection by any person." Rem. & Bal. Code, § 1161.

It was held that under the express wording of the statute the right to maintain an action upon the bond depended upon the giving of such notice, which was a public record and condition precedent, and, as liability on the bond ceased if notice was not given, the provision operated for the benefit of the surety. *Huggins* v. *Sutherland*, 39 Wash. 552 (82 Pac. 112); *Crane* v. *Indemnity Co.*, 43 Wash. 516 (86 Pac. 849); *Robinson Manfg. Co.* v. *Bradley*, 71 Wash. 611 (129 Pac. 382). Although upon a similar subject, the provisions of the Washington statute are so distinctly at variance with the particulars under consideration as to furnish scant precedent. There no distinction of beneficiaries or classification is attempted, no notice of claim or steps of any kind are required while the work is in progress or until 30 days after the contract is completed and accepted, and the required notice, when complied with, like the filing of a lien, becomes a public record, and that such record be made is an imperative condition precedent to any right of action. "Without such fact, no action could be maintained, * * * under the express terms of the statute." *Huggins* v. *Sutherland, supra.* This applied alike to all for whose protection the statute was enacted. The reasons governing those decisions upon that statute cannot be regarded as of controlling application to the provisions found in the act here involved.

Aside from the foregoing considerations, we also are of the opinion that the defendant surety company is not in a position to benefit by plaintiff's alleged violation of the contract, in failing to give timely notice.

Digitized by Google

Upon this record the surety neither has alleged nor proven any actual injury resulting to it from plaintiff's failure to strictly comply with the requirements of the statute as to notice according to the construction contended for. The company being a surety for profit, this is a prerequisite as to it, under the particular facts of this case. The doctrine of *strictissimi juris*, said to be a rule of construction, as discussed and applied in the recent case of *People, for use of Townsend Brick & Contracting Co.*, v. *Bowen*, 187 Mich. 257 (153 N. W. 672), cannot be invoked by the surety under the circumstances disclosed here.

The judgment is affirmed.

BROOKE, C. J., and KUHN, STONE, OSTRANDER, BIRD, and MOORE, JJ., concurred.

The late Justice MCALVAY, who sat in this case, took no part in this decision.

VANDECAR *v.* NOWLAND'S ESTATE.

1. WORK AND LABOR—CONTRACTS—COMPENSATION—EXPRESS CONTRACT.

   If the facts and circumstances attending the performance and acceptance of services rendered show an expectation of receiving compensation by the party rendering the service, and expectation to pay on the part of the one receiving them, a legal liability for the value of the services performed is created, and an express contract is not essential.

2. SAME—ESTATES OF DECEDENTS—CLAIM.

   In an action against an estate for services rendered de-

Digitized by Google

ceased by his son-in-law, evidence that decedent told claimant and his wife to go on a farm owned by him and work it, and what they made was theirs, and the place would be for them, and that deceased at different times made assurances that the farm should be, or was, theirs, was insufficient to establish contractual relations between claimant and deceased, and said statements amounted only to declaration of testamentary intent, not binding on deceased or his estate.

3. SAME—SERVICES OF RELATIVE—PRESUMPTIONS.

Evidence examined, and *held*, that claimant has not, under the circumstances of this case, overcome the presumption that such services, rendered by a relative, are gratuitous.

4. SAME — ESTATES OF DECEDENTS — STALE CLAIM — EVIDENCE — DIRECTED VERDICT.

Where the items composing the claim extended through a period of nearly 30 years, and all were over six years old, and no demand for compensation was ever made during the lifetime of deceased, thus affording a presumption that none was contemplated by either party, particularly strong and convincing proof is required before leaving it to a jury.

Error to Wayne; Murphy, J. Submitted June 30, 1915. (Docket No. 76.) Decided September 29, 1915.

Matthew G. Vandecar presented a claim against the estate of Moses R. Nowland, deceased, for services and for money loaned to deceased. The claim was disallowed and claimant appealed to the circuit court. Judgment for defendant on a directed verdict. Claimant brings error. Affirmed.

George M. Lehman, for appellant.

Condon, Nellis & Condon, for appellee.

STEERE, J. This case involves a claim against the estate of Moses R. Nowland, who died September 2, 1905, leaving, as is indicated, real and personal property of substantial worth, though the amount and ap-

Digitized by Google

praised value of his estate is not disclosed in this record. A widow and children, both by her and a former wife, survived him. His son-in-law, M. G. Vandecar, filed this claim against deceased's estate in the Wayne county probate court. It consisted of items for money loaned, proceeds of property sold, labor and services of himself and team of various kinds, taxes paid and improvements made on a farm owned by deceased and occupied by claimant with his family for many years. The items composing this claim extended through a period of nearly 30 years, and amount to $4,515.

Disallowance of the claim in the probate court was affirmed on appeal to the circuit court, by judgment on a directed verdict, upon the ground that claimant's evidence failed to establish binding contractual relations between himself and deceased touching the items of said claim, and that statements shown to have been made by deceased expressing a purpose to give the farm upon which claimant and his wife resided to them amounted only to declaration of testamentary intent, not binding on him or his estate.

Claimant's assignments of error necessarily relate to the refusal of the court to give his requests to charge and direction of a verdict against him, and present but the one important question of whether his evidence raised an issue for the jury as to a contract, express or implied.

The scene of the events in evidence here is in and around the village of New Boston, in the southwest part of Wayne county, where deceased lived many years of his somewhat protracted life, engaged in a variety of business activities. His daughter Ella, who was married to claimant in 1873, testifies that her father "was in the law business, and had a sawmill, and a store and charcoal kilns." He is also shown to have owned at least five different farms. When claim-

Digitized by Google

ant married, he was "living around New Boston and working at different places, on the railroad at New Boston and Plymouth." Shortly after his marriage he went to work for his father-in-law in his sawmill, and also worked for him hauling logs, wood, coal, stone, etc. Soon after their marriage deceased gave claimant and his wife a small house and lot, called the "$250 place," which was sold, and the proceeds given to deceased to help build a house on a lot owned by claimant; the lumber and labor for this house being furnished by deceased. In 1878 or 1879 arrangements were made by which the second house and lot was sold for $500 and the proceeds turned over to deceased, claimant moving with his then family upon a farm owned by his father-in-law, located about one-half of a mile from New Boston, the latter then furnishing claimant and his wife a team of horses, harnesses and wagon, some hay, two cows, and various farm implements, they being given the use of the farm free of rent, except payment of taxes. Of this claimant's wife testifies:

"Before we went on the place we had a talk with my father. He told us to go down on the farm, and what we made was ours, and to go to work and work it, and the place would be for me and my husband, and he calculated for each of his daughters so much land. * * * There was no talk about our renting the land when we went there. We were to go on the farm and have the benefit of the crops, and we were to pay the taxes, and paid them, except one year."

Claimant and family remained upon this farm for 24 or 25 years, raising a family of 12 children. During the many years they made their home upon the place and enjoyed whatever it produced, claimant raised both crops and stock upon it and made improvements, of which he had the benefit while there. He cleared about 20 acres of land, built fences, a corncrib, pig pen, and other outbuildings, and planted an orchard while

Digitized by Google

upon the farm. He is also shown to have at times, mostly in the winter, worked for deceased with his team, hauling logs, wood, charcoal, stone, etc. The evidence as to these services is general in its tendencies, meager as to dates and values and destitute of any proof of express agreement as to any details. Claimant's wife says he worked for her father whenever he wanted him, and "my father never said anything of an account against my husband. My husband never kept an account against my father for the work he did."

This claim is urged upon the theory and under the general proposition of law that an express contract is not essential to substantiate it, but the facts and circumstances attending the performance and acceptance of the services rendered show an expectation of receiving compensation by the party rendering the service and expectation to pay on the part of the one receiving them, thus creating a legal liability for the value of the services performed. The only claimed proof of any expectation or promises in that connection relates to assurances by deceased that the farm should be, or was, theirs. It is conceded no deed or instrument in writing was given, and there is no proof of any agreement made at the time claimant and his family took possession of the place other than the statement of claimant's wife as to what her father then said to them. That it was supposed by neighbors and expected by claimant and his family that this farm would belong to claimant or his wife, or both, on the death of her father, is evident. That deceased frequently expressed such an intention during the years they were upon the farm is shown—sometimes that it was or would be his daughter's, and sometimes that both should have it. A neighbor named Davis, called by claimant, in the course of his testimony, said:

Digitized by Google

"I said on direct examination that it was his intention that Ella should have the 63 acres. * * * I have heard him say that Ella and Dick [claimant], also Dick and Ella. * * * I never heard him say he was giving it to him [claimant] for labor performed. * * * He talked repeatedly about the manner in which he was going to dispose of his property. * * * He would talk as he felt. * * * I heard him say to me, as well as others, what his intentions were about deeding away his property to his daughters and sons-in-law. I heard that a great many times."

Another witness named Burrows explained the nature of deceased's assurances as follows:

"Well, the place is Dick's. That is the way he used to call it: 'It is Dick's.' I presume likely he said at times, 'It is Ella's and Dick's,' but I could not say. * * * He never discussed with me the question of labor that Mr. Vandecar performed."

A witness named Nowland said:

"He changed his mind a number of times about certain pieces of property."

Claimant's wife and children and a cousin testify along the same lines, but more emphatic, as to hearing deceased at different times giving assurances that the farm belonged to one or both, that they had earned it, that it was going to be theirs, that he was going to give it to them and their children, that he "intended to give it to Ella," that "my father and mother was to work on the farm and us children, and when my grandfather and grandmother was dead it was to be my father's and mother's." Much other testimony of like import was introduced, a careful consideration of which constrains us to agree with the trial court that claimant has not, under the circumstances of this case, overcome the presumption that such services rendered by a member of deceased's family or a closely associated relative are gratuitous where no express contract is shown, nor against such presumption estab-

Digitized by Google

lished an implied contract, and that what is shown to have been said by deceased as to the disposition of this property goes no further than a declaration of testamentary intent.

It is well-settled law that:

"Particularly strong and convincing proof is required where the claim is stale, or where the services extended over a considerable period and no demand for compensation was ever made during the decedent's lifetime." 18 Cyc. p. 533.

Had the friendly relations and reasons for expectation in this case continued until deceased's death, this rule would be less applicable here, but in 1896 deceased's first wife, the mother of Mrs. Vandecar, died, and he subsequently remarried, having children by his second wife. He later sold a tract of ten acres from the farm in question, which led to some friction, resulting in litigation "in which he put them off the place," as stated by one of claimant's witnesses, and retook possession of the premises some six or seven years before he died. The details of this difficulty are not fully disclosed in the record, but it does appear that deceased's position in relation to his ownership of this farm was asserted and maintained by litigation over six years prior to his death and claimant put off the place, after which time he did no work for deceased. He now claims deceased was then owing him over $4,000. There is no evidence of any demand or assertion of this claim during decedent's lifetime. Some items of the claim were over a quarter of a century old, and all over six years, when the alleged debtor died. That no demand for compensation was ever made during his lifetime affords a presumption that none was contemplated by either party and is in itself at least strongly persuasive of laches.

This is of that class of claims in which it is held the duty of the court to require clear and substantial proof before leaving it to a jury to speculate as to the

Digitized by Google

existence of the contract necessary to support them. *Wright* v. *Senn Estate*, 85 Mich. 191 (48 N. W. 545); *Donovan* v. *Driscoll*, 116 Iowa, 339 (90 N. W. 60).

Our conclusion upon the whole record is that the trial court rightly directed a verdict for defendant.

The judgment is affirmed.

BROOKE, C. J., and KUHN, STONE, OSTRANDER, BIRD, and MOORE, JJ., concurred.

The late Justice MCALVAY, who sat in the case, took no part in this decision.

MORTENSEN *v.* BRADSHAW.

1. APPEAL AND ERROR—ARGUMENT OF COUNSEL—SAVING QUESTIONS FOR REVIEW.

   Where defendant's counsel failed to invoke action of the court, after excepting to opposing counsel's remark charging him, without warrant, with pettifogging, he is without remedy, on appeal.

2. TRIAL — ARGUMENT OF COUNSEL — PREJUDICIAL ARGUMENT — ASSAULT WITH INTENT TO RAPE.

   In an action for assault with intent to commit rape, it was error for plaintiff's counsel, in his closing argument, in response to remarks of defendant's counsel that plaintiff, who had previously been seduced by another man, had already received the greatest injury any woman could suffer, and had settled for $400, to reply that neither the jurors nor any parent would feel that their daughter was less entitled to damages by reason of being overpersuaded by a young man to whom she was engaged, and that the position taken by counsel for defendant was unjust and contrary to the natural feeling of parent and child.

3. SAME—ARGUMENT OF COUNSEL—WEALTH OF DEFENDANT—DAMAGES—ASSAULT WITH INTENT TO RAPE.

   In an action for assault with intent to commit rape, it was

Digitized by Google

improper for plaintiff's counsel, in argument, while discussing the question of damages, to refer in detail to the possessions of defendant.

4. SAME—ASSAULT WITH INTENT TO RAPE—DAMAGES—REPUTATION—INSTRUCTIONS.

Where there was no evidence showing loss of reputation and standing in the community as a result of the alleged assault, it was erroneous for the trial judge to permit the jury to award damages therefor.

Error to Ottawa; Cross, J. Submitted June 18, 1915. (Docket No. 64.) Decided September 29, 1915.

Case by Rose Mortensen against Hugh Bradshaw for assault with intent to commit rape. Judgment for plaintiff. Defendant brings error. Reversed.

Visscher & Robinson (*Smedley & Linsey*, of counsel), for appellant.

Diekema, Kollen & Ten Cate, for appellee.

In this action plaintiff sued to recover damages for several alleged assaults with intent to commit rape. The declaration consists of four counts. The first charges a simple assault on the 1st day of June 1914; the second, an assault with intent to commit rape upon the same day; the third, an assault with intent to commit rape on the 28th day of June; and the fourth, an assault with intent to commit rape on the 4th day of July. The offense in each count is charged under a videlicet.

The plaintiff at the time of the trial was an unmarried woman about 24 years of age. On November 16, 1913, she had given birth to an illegitimate child. After the birth of said child she commenced an action against the alleged father, causing his arrest, which she afterwards settled for the sum of $400. In April, 1914, her child then being about 5 months old, she secured a position as housekeeper for the defendant,

Digitized by Google

who had been divorced from his wife and was at that time 75 years of age. Plaintiff testified that, within two weeks of her entry upon service with the defendant, he began to importune her to marry him. She further testified that she declined his proposals, assigning as a reason for her refusal the disparity in their ages. It is her claim that, following her refusal, he attempted, by the use of force, to carnally know her, but that she succeeded in eluding his embraces. Following this incident, plaintiff claims that defendant expressed regret for the occurrence, and promised that it should not happen again. However, he insisted they should be married, and urged her to enter into an engagement with him. This she finally consented to do. As a result of such agreement an antenuptial contract was prepared and executed by them. That contract follows:

"An agreement made by and between Hugh Bradshaw, party of the first part, and Rose Catherine Mortensen, party of the second part: Whereas, it is the intention of the said first party and the said second party to mutually intermarry; and whereas, Hugh Bradshaw has children by a previous marriage for whom he wishes to provide, as well as for the second party: Now, therefore, it is mutually agreed by and between the parties as follows: Said first party agrees to adopt Leroy, the child of the said Rose Catherine Mortensen, and the said second party agrees that the said Hugh Bradshaw shall so adopt the said child, and the said child shall be his child as well as her own, and that his name shall be Leroy Hugh Bradshaw. It is further agreed that, in consideration of the said marriage, the said Hugh Bradshaw will, after the marriage of the parties, convey a life interest in the whole of the first party's homestead property on Macatawa road, in Ottawa county, Michigan, with the remainder vested in the said child and in any children born as issue of the said marriage in case there be any such issue, equally; otherwise, in the said child alone. He further agrees that he will, after the said marriage,

Digitized by Google

will to the said second party one-third interest in all the remainder of his property absolutely, with the exception of his house and lot in Holland, Michigan, on the northeast corner of Twelfth and Central avenue, no part or share of which shall be willed to said second party, but which is to go to Hettie Bradshaw Fergus, his daughter. Said second party agrees, in consideration of the marriage and the agreements of the said first party as hereinbefore stated, that she, the said second party, will accept as much property as is hereinbefore stated by the said first party as her future share of the estate of the said first party in the event of or at the time of his death, and that she waives all right of dower and homestead, or any rights whatever as his widow, except as hereinbefore stated. And she further agrees that she will quitclaim her interest in the property on the northeast corner of Central avenue and Twelfth street in the city of Holland to the said Hettie Bradshaw Fergus, at such time and whenever the first party may desire. Second party further agrees that she will not incumber or transfer any of the property herein mentioned now or later. The said parties mutually agree that in the event of a separation this agreement shall be null and void.

"June 16, 1914.

[Signed] "HUGH BRADSHAW,
"ROSE CATHERINE MORTENSEN."

It will be noted that the date of the contract, June 16, 1914, is about two weeks later than the first of the assaults charged in the declaration. Plaintiff continued to live with defendant up to the 4th of July, some two or three weeks later. She testified that during this period she considered the defendant engaged to her, but that she was not engaged to him, and had no intention of marrying him. She further testified:

"I didn't consider myself engaged to him at that time, or any time. I just let him sign this paper, and let him go on with this just to fool the old man, because he had told me that he couldn't marry before October anyway, and we thought by that time that he would forget it and it would be entirely over."

Digitized by Google

Defendant, who was called by the plaintiff under the statute, denied the several assaults charged by the plaintiff, but claimed to have had sexual intercourse with her on three occasions with her consent, and averred his willingness to marry her.

Upon the measure of damages the court charged the jury as follows:

"The offense charged in the declaration in this case is not a simple assault and battery, such as striking the plaintiff with the hand or fist, but an aggravated assault and battery, consisting of the taking of indecent liberties with the person of the plaintiff, and attempting to ravish and carnally know her; and if you find that the defendant is guilty of this sort of an offense, then, in determining the damages to which she is entitled to compensate her, you should take into consideration not only her physical injury and suffering, if any, but also the injury to her feelings, and any disgrace or humiliation or injury to her name or reputation, if any. I charge you that, if you find for the plaintiff, in reaching the amount of your verdict you may consider the nervous shock sustained by the plaintiff, if any, by reason of the acts of the defendant, her anxiety, physical pain and suffering, injury to feelings, disgrace, and loss of reputation, if any. These elements of damages are not in the nature of things susceptible of exact computation, but the jury must determine the amount as their best, candid, and careful judgment shall dictate."

Plaintiff recovered a verdict of $5,000.

BROOKE, C. J. (*after stating the facts*). There are some 46 assignments of error, only a few of which it will be necessary to consider. There are several assignments based upon alleged erroneous rulings with reference to the admission of testimony. We find no reversible error here.

During the cross-examination of the plaintiff by defendant's counsel, plaintiff's counsel, in the presence of the jury, charged defendant's counsel with pettifog-

Digitized by Google

ging. An exception was taken to the statement by defendant's counsel, but no action of the court was invoked upon the matter. We are of opinion that the language of plaintiff's counsel was unwarranted, and, had the trial court been appealed to, a timely instruction to the jury would doubtless have rendered the remark harmless. Defendant's counsel, having failed to invoke such action on the part of the court at the time of the occurrence, is now without remedy.

During the argument to the jury the following occurred:

"In their argument, counsel for defendant argued to the effect that plaintiff could not recover damages in any substantial amount, because she had already received the greatest injury that any woman could suffer, and had settled this for $400. Mr. Diekema, in his closing argument for the plaintiff, insisted that neither the jurors nor any parent would feel that their daughter was less entitled to damages by reason of having been overpersuaded by a young man to whom she was engaged, and that the position taken by counsel for the defendant was entirely unjust and contrary to the natural feeling of parent and child. The following then occurred:

"*Mr. Visscher:* I except to that statement.

"*The Court:* Think you had better leave that out. They should try this case according to the testimony received here.

"*Mr. Visscher:* The question is not how their daughter would feel about it.

"*Mr. Diekema:* Do you expect to eliminate the heart of men and paternal feelings in a case of this kind?

"*The Court:* No.

"*Mr. Visscher:* We except to Mr. Diekema's remark.

"Later on, in the course of the same argument, Mr. Diekema, while discussing the question of damages, reviewed the testimony in detail relating to the possessions of the defendant, whereupon the following occurred:

"*Mr. Visscher:* I object to that; the remarks about Mr. Bradshaw being a rich man. Take an exception to it.

Digitized by Google

"*The Court:* It is in the testimony; I suppose he has a right to argue from it."

We are of opinion that the argument of counsel for plaintiff constitutes reversible error under several late decisions of this court. Juries are not to be invited to assess damages upon the basis of the amount they would be willing to accept as compensation for the wrongs alleged to have been suffered. The case was one in which an appeal to the passions and prejudices of the jury was likely to produce unfortunate results. Upon this point see *Hughes* v. *City of Detroit,* 161 Mich. 283 (126 N. W. 214, 137 Am. St. Rep. 504); *Morrison* v. *Carpenter,* 179 Mich. 207 (146 N. W. 106), and *Wells* v. *Railroad Co.,* 184 Mich. 1 (150 N. W. 340).

We are likewise of opinion that the argument of counsel relative to the alleged wealth of defendant was an improper one to make in the case, where the charge is one of assault with intent to commit rape. *Johnson* v. *Railway Co.,* 135 Mich. 353 (97 N. W. 760); *Holmes* v. *Loud,* 149 Mich. 410 (112 N. W. 1109).

We have examined this record with care, and find no evidence warranting the trial court in permitting the jury to award damages to plaintiff on account of loss of reputation and standing in the community. *Totten* v. *Totten,* 172 Mich. 565 (138 N. W. 257).

A motion for a new trial was made based, *inter alia,* upon the ground that the verdict was excessive. As the case must go down for a new trial, because of the errors pointed out, it is unnecessary to consider the question presented by this assignment of error.

The judgment is reversed, and a new trial ordered.

KUHN, STONE, OSTRANDER, BIRD, MOORE, and STEERE, JJ., concurred.

The late Justice MCALVAY took no part in this decision.

Digitized by Google

ZACHARIAS v. DONALDSON.

BILLS AND NOTES — CHECK — INSURANCE PREMIUM — STOPPAGE OF PAYMENT—RETURN OF CONSIDERATION.

Where the insured notified plaintiff, a general insurance agent, that he would not continue in force an insurance policy, but told him to see defendant, who was interested as beneficiary or otherwise, who could continue it if she wanted to, and defendant gave plaintiff a check and received the premium receipt therefor, the effect was to continue in force the policy, notwithstanding defendant's subsequent attempt to repudiate the policy by stopping payment of the check, where she failed to return the receipt and policy, and in an action for the amount of the check, a verdict was properly directed for plaintiff.

Error to Wayne; Hosmer, J. Submitted June 21, 1915. (Docket No. 84.) Decided September 29, 1915.

Assumpsit in justice's court by Melville H. Zacharias against Lavina B. Donaldson for the amount of an insurance premium. From a judgment in favor of plaintiff, defendant appealed to the circuit court. Judgment for plaintiff on a directed verdict. Defendant brings error. Affirmed.

Galloway & Graham, for appellant.

Austin L. Richardson, for appellee.

BROOKE, C. J. On January 21, 1913, the plaintiff, as general agent of the Connecticut Mutual Life Insurance Company, through one of his agents, insured the life of one Donaldson Craig for $10,000, and caused to be issued to said Craig a policy requiring quarterly payments, payable in advance, in the sum of $57.30 each. Defendant was either the beneficiary named in said policy or the assignee thereof under a formal as-

Digitized by Google

signment. The second premium fell due April 21, 1913. Thirty-one days of grace in which payment of said premium could be made were allowed by the rules of said company. The insured had indicated to plaintiff prior to the expiration of the days of grace that he personally did not intend to continue said policy in force by the payment of the second quarterly installment of the premium. Testifying on behalf of defendant, Craig said:

"*Q.* Now, coming up to May 22d, which seems to be the date they obtained the check, had you an interview then with one of the solicitors upon that day?

"*A.* I do not recall. * * *

"*Q.* Now, you say you did not see any of these solicitors, as you recall, in the office; did you get a telephone message from him?

"*A.* Yes, sir.

"*Q.* Did you tell him to send over and get a check?

"*A.* I told him that I would not continue the policy; if Miss Donaldson wanted to continue it herself she could do so; and under those circumstances he could send over and get a check, if she cared to continue the policy.

"*Q.* Then you answered his phone in that way?

"*A.* Yes, sir.

"*Q.* But that you would not continue the policy?

"*A.* I would not do it.

"*Q.* Now, upon the date this check was issued you were not in the office, as I understand it?

"*A.* No, sir.

"*Q.* What did you say when you learned it was issued?

"*A.* I told her that I had emphasized the point that I would not continue it myself; I did not want it at all.

"*Q.* But you learned by going to the office that a check had been issued?

"*A.* Yes, sir. * * *

"*Q.* Did you inform her [defendant] of that in any way?

"*A.* I told Miss Donaldson that if she continued that policy that she could continue it for herself, but that I would not continue it for myself, and if she gave that

Digitized by Google

check that she should have an understanding with me beforehand; that she was to have an understanding with me before she paid that check as to who was to pay that money; that I did not intend to do it."

Defendant when upon the stand testified as follows:

"*The Court:* Did he leave you a quarterly receipt at that time when you gave the check; did you see the paper Mr. Galloway has? Is this what the solicitor gave you at the time you gave the check?

"*A.* I could not say that he gave it to me or that he sent it or what; I could not say.

"*Mr. Richardson:* That is the one that was given, anyway?

"*A.* It might have been sent."

The evidence shows conclusively that as a result of the conversation over the telephone upon the 22d day of May, 1913, being the last day of grace, plaintiff sent a messenger to the office of Craig, the insured, in which the defendant seems to have been employed, and there caused to be delivered to her a renewal receipt which continued the policy in force for another quarter, accepting her check for $57.30 in payment therefor. The record further shows that this check was deposited by plaintiff in his private account, and settlement made by him upon the same day, for the premium, with his company, and with the representative of the soliciting agent who was entitled to a certain percentage of the premium. The check was returned marked "Insufficient funds." It was presented many times during the following ten days, with the same result, and finally placed in the hands of an attorney for collection. Upon presenting it in person to the bank on which it was drawn, the attorney was notified that payment of the check had been stopped by the defendant, who had drawn it. Neither the defendant nor Craig, the insured, caused to be delivered to the plaintiff the renewal receipt of the policy of insurance.

The learned trial judge, in directing a verdict for plaintiff, charged the jury as follows:

Digitized by Google

"According to the testimony of Miss Donaldson, she notified the bank at that time after she had a conversation with Mr. Craig, not to pay the check. It does not seem to me, gentlemen of the jury, that under the circumstances of the case it is essential to determine the truth of either statement. There is no question but at the time of the giving of the check this receipt was left, the effect of which was to continue the policy in force for a period of three months. That check was not returned; consequently, under the testimony in this case, the check was taken as payment of the premium, and taken by Mr. Zacharias in that way, and it represented so much cash, and under the existing circumstances, having been taken as payment by him, there could not, unless the receipt was returned to the company—the policy and the receipt returned to the company—there could not have been a successful defense in case Mr. Craig had died within that period. Under these circumstances, there having been a failure to return the policy and receipt at the time Miss Donaldson claims to have repudiated the policy, I do not think she can now say the check is not in force."

We discover no reversible error, and the judgment is affirmed

KUHN, STONE, OSTRANDER, BIRD, MOORE, and STEERE, JJ., concurred.

The late Justice MCALVAY took no part in the decision of this case.

Digitized by Google

PIKE v. HALPIN.

1. CONSTITUTIONAL LAW — EXECUTION SALE — SHERIFF'S DEED — STATUTE OF LIMITATIONS.

   Act No. 63, Pub. Acts 1901, providing that if the time of redemption from a sheriff's sale had elapsed before the taking effect of the act, a deed might be given within five years from the time the act shall take effect, and that when such deed is not taken and recorded within the time limited, the certificate of purchase shall become null and void, is not unconstitutional as depriving an execution purchaser of his property without due process of law, as his rights previous to deed are inchoate and confer no beneficial use of the premises; defendant's deed, not having been executed by the sheriff until after the expiration of the five years limited by the statute, is null and void.

2. SAME—RECORDING DEED.

   As to the effect of failure of the execution purchaser to record the deed within five years which had been taken out within that period,—*quære*.

Appeal from Lapeer; Smith, J. Submitted June 28, 1915. (Docket No. 38.) Decided September 29, 1915.

Bill by Alice L. Pike against Theodore D. Halpin, administrator of the estate of Oliver H. Wattles, deceased, and another, to have a sheriff's deed to defendant decreed to be null and void. From a decree for defendants, complainant appeals. Reversed and decree entered in this court.

Herbert W. Smith, for complainant.

Geer, Williams & Halpin, for defendants.

BROOKE, C. J. The complainant in this case is the widow of Harmon D. Pike, who died May 27, 1897. On the 23d day of March, 1889, Harmon D. Pike, then being seised of the premises in question, executed a deed of the same to his two children, Lucy Pike and

Digitized by Google

Charles L. Pike, reserving therein a life estate to the complainant. On May 29, 1896, Charles L. Pike executed a deed of his interest in said premises to his mother, the complainant. This deed was recorded on August 24, 1896. On May 19, 1896, the sheriff of Lapeer county caused a levy to be made upon the interest of Charles L. Pike in the premises on an execution issued out of the circuit court for the county of Lapeer, in an action wherein Oliver H. Wattles was plaintiff and Charles L. Pike was defendant. The levy was recorded in the office of the register of deeds on the 19th day of May, 1896. On April 20, 1900, said premises were sold on an execution sale to Oliver H. Wattles, and a certificate of sale duly filed and recorded in the office of the register of deeds of Lapeer county on April 23, 1900. Oliver H. Wattles died intestate March 23, 1911. Defendant Theodore D. Halpin was duly appointed administrator of said estate May 3, 1911. On June 24, 1911, John W. Scully, then sheriff of Lapeer county, executed a sheriff's deed of the premises mentioned in the bill of complaint to defendant Halpin, administrator of the estate of Oliver H. Wattles, deceased. Said deed was executed by virtue of the certificate of sale given to Oliver H. Wattles on the execution sale held on the 20th day of April, 1900. The bill of complaint sets forth the foregoing facts, and prays that the certificate of sale be vacated, set aside, and decreed to be null and void, and that the deed to defendant Halpin, as administrator, recorded on the 24th day of June, 1911, be likewise vacated, set aside, and decreed to be null and void as against complainant. Complainant bases her right to relief on Act No. 63 of the Public Acts of 1901, section 1 of which provides:

"When the premises mentioned in any sheriff's certificate of sale of real estate under execution shall not be redeemed in pursuance of law, the legal holder of

Digitized by Google

such certificate shall be entitled to a deed therefor at any time within ten years from the expiration of the time of redemption. If the time of redemption shall have elapsed before the taking effect of this act, a deed may be given within five years from the time this act shall take effect. When such deed is not taken and recorded within the time limited by this act, the certificate of purchase shall become and be null and void."

From a decree dismissing the bill, complainant appeals.

The sole question argued touches the constitutionality of the section above quoted. It is conceded that more than five years elapsed after the act in question went into effect before the deed to defendant Halpin was executed. It is the contention on behalf of defendant that this provision is unconstitutional and void, for the reason that it operates to deprive the execution purchaser of his property without due process of law. Counsel for defendant cite the following authorities: *Whipple* v. *Farrar*, 3 Mich. 436 (64 Am. Dec. 99); *Willis* v. *Jelineck*, 27 Minn. 18 (6 N. W. 373); *Campbell* v. *Holt*, 115 U. S. 620 (6 Sup. Ct. 209), and *Gunn* v. *Barry*, 15 Wall. 610. These cases, it is asserted, sustain defendant's contention that after the time for redemption had expired the execution purchaser had such a vested interest in the property that he could not thereafter be deprived of it by mere legislative enactment.

Complainant insists that the statute is properly maintainable as a statute of limitations, and that it deprives the purchaser at an execution sale of no right except that of indefinite delay in completing his title. It is further asserted that the time limited after the act took effect during which the execution purchaser might demand and record his deed is a reasonable one. Reference is made to the case of *Whipple* v. *Farrar*, *supra*, where it is said:

"The proceeding by which the judgment debtor is

Digitized by Google

to be divested of his property is a statutory one, and until that proceeding has been completed, so as to vest the title, and with it the right to the possession in another, he may lawfully remain in the use and occupation of the premises without being accountable. Upon the expiration of the time limited for redeeming, if the premises are not redeemed, the purchaser, or person holding his title, has a right to have the sale completed by the execution of a deed of conveyance which will give him the right of possession; but until such deed is executed, or he become in some other way vested with the legal title, he has no right to demand, and cannot recover the possession, and not having been entitled to the possession, he has no claim on account of the use and occupation."

The rights of purchasers at execution sales were later considered in the case of *Whiting* v. *Butler*, 29 Mich. 122. Three opinions were written in the case. While disagreeing in some matters, they seem to agree that the rights secured by an execution purchaser at the sale are inchoate before deed, and that it is necessary for the purchaser to procure his deed in order to complete his title; that the mere purchase and certificate of sale alone either before or after the expiration of the redemption period do not confer any right to possession or beneficial use of the premises. The same principle is recognized in the case of *Cook* v. *Knowles*, 38 Mich. 316, 322, where it is said:

"But one thing is quite clear, and it is that the plaintiff acquired no complete legal title or any right of possession until October, 1856, when the redemption was over and he obtained his deed, and this was less than 20 years before suit. No one could raise a right against him to the premises by an adverse holding whilst he was not invested with the legal title and could not enter at all for his own protection."

The claim advanced by defendants that the statute operates as a confiscation of defendant's property rather than as a reasonable limitation is, we think, untenable. When the redemption period had expired,

Digitized by Google

Wattles had an interest in the premises in question. The interest, though assignable and capable of being inherited, was inchoate in character, until by his own act in taking a sheriff's deed it ripened into a complete estate. Until he took that action the right to possession and the beneficial use of the premises belonged to the execution debtor or his grantee. The fact that the estate sold to Wattles was a remainder, subject to an intervening life estate, is of no importance. Had he chosen within five years after the expiration of the redemption period to take out his deed, he would thereupon have become vested with the right of possession, the enjoyment of which would be postponed during the continuance of the life estate.

Counsel for defendant concede the validity of the statute so far as it affects sales made after the act took effect. In our opinion, the argument which would invalidate the latter part of the section would be equally cogent as against the earlier part. It is urged that under the latter part of the section the failure of the execution purchaser to record the deed within five years which had been taken out within that period would operate to defeat the title of the execution purchaser and his deed. In this case it is unnecessary to determine the effect of the statute requirement as to recording the deed. No such question is here presented; the deed itself not having been executed by the sheriff until long after the expiration of the five years limited by the statute. See, generally, *McKesson* v. *Davenport*, 83 Mich. 211 (47 N. W. 100).

The decree of the court below is reversed, and one will be entered in this court in accordance with the prayer in the bill of complaint.

KUHN, STONE, OSTRANDER, BIRD, MOORE, and STEERE, JJ., concurred.

The late Justice MCALVAY took no part in this decision.

Digitized by Google

OCTOBER TERM, 1915.

WEIR *v.* UNION TRUST CO.

1. TRUSTS—CONTRACTS—FRAUDULENT ACTS.

   Evidence claimed by complainant to prove fraudulent conduct between decedent and defendant trust company to enable the latter to evade trust obligations and take in its name property of complainant in its hands in trust under an oral arrangement, *held*, to be insufficient to support the averments of fraudulent conduct as to either defendant or the deceased.

2. SAME—EVIDENCE.

   Fraud is not to be lightly presumed, but there must be substantial evidence to establish it.

3. SAME—FORECLOSURE.

   Held, also, that the price obtained for the property mortgaged was not so excessively low as to indicate fraud or collusion, and that the holder and purchaser bought in good faith for an adequate consideration.

4. SAME—CONSTRUCTIVE TRUSTS.

   Where decedent appeared from the testimony to have interested himself in the affairs of complainant from disinterested motives and at her instance and desire, to help her save a valuable equity in heavily incumbered property, and had no expectation of compensation or reward for his services, and the relation between complainant and decedent was friendly in his lifetime and he would not have claimed or withheld any part of the amount finally realized by the sale of the property, the trial court was justified in finding that the excess of proceeds above costs, expenses, etc., realized by a sale of the incumbered realty by the trust company which had bid it in, should be impressed with a constructive trust in her favor under an agreement between decedent and defendant trust company that it should make advances needed to bid in the property in its name, and to hold the property for decedent.

Digitized by Google

5. SAME—EQUITY.

Fraud is not necessary to give rise to a constructive trust, but if circumstances are such as to render it inequitable for the holder of the legal title to retain the same, the court may charge it with a trust in favor of the equitable owner. Implied trusts arise by operation of law as contradistinguished from those that arise from agreements of the parties, and are raised by law for the purpose of carrying out the presumed intent of the parties, or without regard to such intention for the purpose of asserting equitable rights or frustrating fraud. This form of trust is practically unlimited in extent and is employed whenever, in the opinion of the court, it becomes necessary to prevent a failure of justice.

6. SAME—INTEREST.

It is further *held* that the trustee under such implied trust should be charged with such interest on the sums in its hands as they may have earned during the time it held said money or proceeds.

Appeal from Wayne; Van Zile, J. Submitted June 16, 1915. (Docket No. 53.) Decided October 12, 1915.

Bill by Catherine B. Weir against the Union Trust Company and others for the enforcement of a trust. From a decree for complainant, both parties appeal. Modified and affirmed.

Fritz L. Radford (*Geer, Williams, Martin & Butler* and *Thomas A. E. Weadock,* of counsel), for complainant.

Angell, Bodman & Turner, for appellant Union Trust Co.

Campbell, Bulkley & Ledyard (*Henry Ledyard,* of counsel), for appellees Union Trust Co. and Fred M. Alger.

Miller, Smith, Canfield, Paddock & Perry, for defendant Country Club and subsequent purchasers.

Digitized by Google

KUHN, J. The complainant inherited the property here involved, known as the "Weir farm," situate in Grosse Pointe, Wayne county, in this State, and also certain property designated in the record from time to time as the "city property," situated in the city of Detroit, from her parents. The Weir farm is now owned by the Country Club of the City of Detroit, and used by that club for golf links, excepting certain lots which have been sold by the club to purchasers who are made defendants herein. The farm property was managed by the husband of the complainant during his lifetime, but he died December 3, 1886. It is alleged by complainant that after the death of her husband the property became unproductive, and, as she was in need of means for her support and to pay certain debts which she had incurred, she borrowed money from time to time and gave mortgages on the property. Her custom when she needed money was to give a new mortgage and pay the mortgage then on the property with the proceeds of the new obligation. In 1900 she borrowed $18,000 from one William Cottrell, of Mt. Clemens, Mich., and gave a mortgage for that amount on her city property, and in 1901 she borrowed from him $47,862, and gave him a mortgage covering both her farm and the city property. In the same year she gave Ernest C. Miller, who had been her business agent, a mortgage for $2,200 on her farm, and a chattel mortgage for a like amount. This mortgage was assigned October 9, 1901, to William G. Smith, who was a confidential employee of Joseph H. Berry in his lifetime. In the same year Mr. Cottrell began foreclosure of the $18,000 mortgage on the city property.

Her financial matters having become involved and embarrassing to her, early in 1902, needing advice and financial assistance, Mrs. Weir applied for assistance to the late Dexter M. Ferry, and Mr. Ferry referred

Digitized by Google

her to the Union Trust Company, which company examined and put a value upon her property, and learned the amount of her indebtedness. It is Mrs. Weir's claim that she made an oral arrangement with the trust company by which the company was to take charge of her property in trust for her; that she was referred by the trust company to Mr. Joseph H. Berry, who was a man prominent in the business affairs of Detroit and resided at Grosse Pointe, and consulted with him. Mr. Berry was doing business with the trust company at the time. The trust company denies that it ever accepted the property in trust. It appears, however, that Mr. Berry and the Union Trust Company took charge of her affairs, and on August 19, 1902, the trust company purchased the city property at the foreclosure sale under the first Cottrell mortgage, and advanced the purchase price, and took the circuit court commissioner's deed in its own name, which advancement was guaranteed by Mr. Berry to the trust company. On September 14, 1902, an agreement was entered into between Mr. Berry and the trust company, which was dated and signed as of August 8th. It was in terms as follows:

"An agreement, entered into on the 8th day of August, A. D. 1902, between Joseph H. Berry, of Detroit, Michigan, and the Union Trust Company, a corporation, of the same place, witnesseth:

"Whereas, said party of the first part has secured and desires to secure from said party of the second part, certain advances of money to be used in the paying of debts of and claims against Catherine B. Weir, of Detroit, Michigan, and in acquiring title to certain real estate owned by said Catherine B. Weir, upon the sale of said real estate, under foreclosure proceedings or execution sales:

"Now, therefore, said party of the first part, in consideration of said advances, which he has and which he may receive from said party of the second part, does hereby agree to repay and reimburse the said

Digitized by Google

party of the second part for all of its advances to him which have already been made or which may hereafter be made, for the purposes above stated, in two (2) years from the date hereof, with interest on all sums so advanced at the rate of five per cent. (5%) per annum, payable semi-annually; and said party of the second part does hereby agree upon the written request of said party of the first part so to do, to make advances of money to said party of the first part, as above provided, and also to bid in, in its name or otherwise, upon the written request of said party of the first part, the real estate of said Catherine B. Weir, under foreclosure proceedings or execution sales, and to hold for said party of the first part any property purchased in its name, and to attend to the application of its advances to the payment of the debts of and claims against said Catherine B. Weir, under the advice and direction of Russel & Campbell, its counsel.

"It is expressly understood and agreed by the parties hereto that said party of the second part shall receive two hundred and fifty dollars ($250.00) per annum as its compensation for performing its duties hereunder. The fees of said counsel of said party of the second part, together with its costs and disbursements, shall be paid by the said party of the first part, and shall be regarded by the parties hereto as advances made to said party of the first part by said party of the second part, under this agreement.

"In witness whereof, the parties hereto have hereunto set their hands and seals the day and year first above written.

"JOSEPH H. BERRY [L. S.]
"UNION TRUST COMPANY [L. S.]
"By ELLWOOD HANCE, Secretary."

We find that Mrs. Weir was appreciative of what Mr. Berry was doing for her, as in August, 1902, she wrote him a letter in which she thanked him for taking care of her city mortgage and urged him to get the rate of interest reduced, which was accomplished by Mr. Berry in due time by arranging to have the trust company carry the mortgage on the city property and reduce the rate of interest from 7 to 5 per cent. From time to time the trust company paid out money either

Digitized by Google

direct to Mrs. Weir or to her creditors, and for taxes of various kinds upon her real estate, which advancements were always approved by Mr. Berry. These advancements would be made by Mrs. Weir's requesting Mr. Berry to authorize the payment by the trust company of the account or accounts in question.

In March, 1903, the Cottrell mortgage of $47,862 fell due, and interest was in arrears. Mrs. Weir being without funds, and in order to avoid a foreclosure, it was arranged with Mr. Cottrell that the mortgage be extended until March 14, 1908, the interest reduced from 7 to 5 per cent. upon payment to Cottrell of the sum of $6,700. This amount was paid by the trust company and charged to the account of Mr. Berry, who then insisted on further security for himself. A mortgage was prepared by Mr. Boynton, his attorney, which, after being examined by Mr. Corbett, attorney for Mrs. Weir, was signed by her March 17, 1903. At this time she knew of the agreement of August 8, 1902, between Mr. Berry and the trust company. About January 23, 1903, Mrs. Weir was sent a statement of all the advances made by Joseph Berry through the trust company, and from that time until the death of Mr. Berry, in 1907, quarterly statements were sent to both Mrs. Weir and Mr. Berry showing in detail the advancements made throughout the quarter, and were under the caption "Union Trust Company, Account of Joseph H. Berry—Re Catherine B. Weir." In August, 1904, the Berry-Trust Company agreement expired, and as Mrs. Weir had not sold her property, it was renewed for two years. In August, 1906, the same situation prevailed, and the agreement was again renewed until March, 1908, when the Cottrell mortgage as extended fell due. Mrs. Weir was sent copies of these extensions. In August, 1906, the advances through the trust company had risen to over $40,000, and directly by Mr. Berry to $4,158, and Mr. Boynton

Digitized by Google

suggested that a further mortgage be given by Mrs. Weir to Mr. Berry for his security. Such a mortgage was prepared by Mr. Boynton and executed by Mrs. Weir in the offices of the trust company on September 22d in the presence of Mr. George F. Monaghan, representing Mrs. Weir as her attorney.

Matters continued as before until the death of Mr. Berry, in May, 1907, and the trust company, claiming that it was not warranted in making further advances, stopped doing so. The officers of the trust company, as administrators of the estate of Mr. Berry, urged Mrs. Weir to sell her property, but this she did not do, and in March, 1908, the executor of the estate of Mr. Cottrell began foreclosure of the $47,862 mortgage, claiming it to be a first lien on both the city and farm property, and in April, 1908, the Union Trust Company, as administrator of the estate of Joseph H. Berry, began foreclosure of the mortgages of 1903 and 1906 given by Mrs. Weir to Mr. Berry on the farm. At the same time, the trust company filed another bill to foreclose its equitable mortgage on the city property represented by the deed from the circuit court commissioner given to it after the foreclosure of the first Cottrell mortgage of 1900, but did not go to a decree, and was later discontinued. Mrs. Weir was served with process in each case, and appeared by her solicitor. The Berry estate and Cottrell foreclosures proceeded to decree, and the court found that there was due the executor of the Cottrell estate the sum of $53,376.31, and that there was due the administrator of the Berry estate the sum of $56,312.08, and that the farm should be sold subject to the superior lien of the Cottrell mortgage.

Pursuant to the decree, the property was sold on September 10, 1909. It was first sold under the decree in the suit brought by Berry's administrator, and was bid in subject to the Cottrell mortgage for $55,000.

Digitized by Google

The property was then sold under the decree taken in foreclosure by Cottrell's executor, and was bid in by the Union Trust Company in its individual capacity, upon advice of counsel for the estate of Berry, for the amount due at the time, $54,140.11, and the amount was charged to the estate of Berry and allowed in its account to the probate court. The time of redemption under these sales expired March 10, 1910, and, although Mrs. Weir was urged by the officers of the Berry administrator to redeem and save any equity there might be, she allowed the time to elapse without doing so. The Berry administrator then endeavored to find a purchaser for the property.

An option was given to Mr. F. T. Moran to buy the Weir farm at a minimum of $150 per front foot for 30 days, which was extended 30 days and allowed to lapse. In October, 1910, Mr. Frederick M. Alger, then president of the Country Club, sought to buy the property. By permission of the probate court, the administrator of the Berry estate entered into a contract to sell the land to him for $165,000, or about $128 per front foot. The sale was carried through, and Mr. Alger took a quitclaim deed from the trust company, which held the bare legal title under the purchase at the Cottrell foreclosure sale, and a conveyance with limited covenants of warranty from the administrator of the estate of Berry. Mr. Alger at once conveyed to the Country Club for a nominal consideration, and at his own expense furnished title insurance rather than give a warranty deed when he himself had not received such a deed. Mrs. Weir, in the spring of 1911, went to the trust company and told its officers that she did not think the deed to Mr. Alger was worth the paper it was written on, and on September 10, 1912, she gave written notice to the trust company, and also to the Country Club, that the conveyance to Mr. Alger was a fraud and a violation of her rights. On May

Digitized by Google

24, 1913, the bill of complaint in this case was filed. The bill makes general and specific charges of fraud, and prays to have impressed upon the title to this farm, acquired by the Union Trust Company, a constructive trust for her benefit, and to have this trust follow the title to this property into the hands of the Country Club and the other defendants who now hold it; for an accounting by the Union Trust Company, both individually and as administrator, for the purpose of determining the amount of her indebtedness to them and advances of money made by them for her benefit; and for the restoration of her title to the Weir farm upon redemption thereof by her paying such indebtedness; and also for alternative relief.

The learned circuit judge who heard the case below dismissed the bill as to all the defendants but the administrator of the Berry estate, and held that the funds in its hands paid by the Country Club, to wit, $165,000, were impressed with a constructive trust, and that the Union Trust Company, who had notice of the situation and the facts, was bound as the administrator of Berry's estate to carry out that trust. Both complainant and the trust company as administrator have appealed.

It is the theory of the complainant's bill that the Union Trust Company entered into an agreement with Mrs. Weir in the summer of 1902, whereby it took all her property in trust to manage it, preserve, and sell it for her, and that the Berry-Trust Company agreement of August 8, 1902, was not made in good faith, but was merely a sham under which the trust company could evade its fiduciary duties to her.

After a very careful review of this record, we are unable to find that this contention of complainant is sustained by the proofs. The circuit judge found—and we are in entire accord with his finding—that from the time Mrs. Weir first came to the trust company

Digitized by Google

and was referred to Mr. Joseph Berry, and from the time Mr. Berry took the superintendency of her business through the trust company, the business was conducted with zealous care upon the part of both the trust company and Mr. Berry. Space forbids reviewing the testimony with reference to the communications between Mrs. Weir and the trust company which show that she must have known the true relation between the company and Mr. Berry, and which show beyond controversy that the trust company had no trust relation whatever with complainant, but that it was Mr. Berry to whom she looked for advice and assistance. Beginning January 24, 1903, and every three months thereafter through the entire period involved in this suit, the trust company sent Mrs. Weir and Mr. Berry duplicate statements showing in detail receipts and disbursements for the period covered, and carrying forward the balance from the preceding quarters, all of which statements were under the caption set forth above in the statement of facts. Indeed, it is quite significant in this connection that, instead of relying upon the trust company whenever an important step was taken with relation to her affairs, she secured her own separate and independent counsel, and was guided by them.

It is elementary that fraud is not lightly to be presumed, but there must be substantial evidence to prove it. Recent reiteration of this principle is found in the following cases, where previous decisions of this court are cited: *Donnelly* v. *Lyons*, 173 Mich. 515 (139 N. W. 246); *Island Mill Lumber Co.* v. *City of Alpena*, 176 Mich. 575 (142 N. W. 770); *Appenzeller* v. *Appenzeller*, 177 Mich. 303 (143 N. W. 70). Complainant has completely failed to show any fraud or unfair dealing on the part of the trust company.

There also cannot be any question on this record of the good faith and fair dealing of Mr. Frederick M.

Digitized by Google

Alger, who purchased the property from the administrator, and also that the Country Club purchased the farm without notice, either constructive or actual, of any outstanding equities thereon in favor of Mrs. Weir.

We are also satisfied that the consideration paid for the property, approved by the probate court, was a fair price for the property at the time the sale was made. It is true that property along the lake shore, because of its limited extent, has had a great rise in value; but we are satisfied that the property was not sold for such an inadequate consideration that the purchaser should not be deemed a *bona fide* purchaser. Mr. Alger, who made no profit out of the deal whatsoever, had the title examined by competent title examiners, and in good faith relied upon the opinion of reputable counsel as to the title of the property purchased by him and turned over by him to the club of which he was the president.

The general charges of fraud with relation to the conduct of Mr. Berry also find no support in the record, and in our opinion are without foundation in fact. It conclusively appears that Mr. Berry was a man of charitable impulses, and we are convinced that he was persuaded by Mrs. Weir to undertake to help her from the goodness of his heart, realizing that, if no help was extended to her at the time she came to him, she would undoubtedly lose all her equity in the property inherited by her and be left without support of any kind. The conclusion is also irresistible that he did not enter into his dealings with her with any thought of receiving compensation for his service, and it is indeed unfortunate, in view of this kindly and charitable disposition on his part, that his acts should, by the bill of complaint filed in this cause, be clouded with even the suggestion of fraud.

Counsel for the trust company, as administrator, earnestly contend that the relation between Mr. Berry

Digitized by Google

and Mrs. Weir was simply that of lender and borrower, of mortgagor and mortgagee, and not that of trustee and beneficiary. The trial judge was convinced, and found, that if Joseph H. Berry had lived to close this matter he himself would never have taken one cent of the money received from the Country Club over and above the actual amount paid out in transacting the business, and this record cannot be read, in our opinion, without coming to the same conclusion. But, whether this is true or not, a decision of this case need not be rested upon that ground.

Constructive trusts arise by operation of law. The following is found in 39 Cyc. p. 169:

"Constructive trusts do not arise by agreement or from intention, but by operation of law; and fraud, active or constructive, is their essential element. Actual fraud is not necessary, but such a trust will arise whenever the circumstances under which property was acquired make it inequitable that it should be retained by him who holds the legal title. Constructive trusts have been said to arise through the application of the doctrine of equitable estoppel, or under the broad doctrine that equity regards and treats as done what in good conscience ought to be done. Such trusts are also known as trusts *ex maleficio* or *ex delicto*, or involuntary trusts, and their forms and varieties are practically without limit, being raised by courts of equity whenever it becomes necessary to prevent a failure of justice."

Also, the following, in 15 Am. & Eng. Enc. Law (2d Ed.), p. 1123:

"Implied trusts, properly speaking, are such only as arise by operation of law as contradistinguished from such as arise by properly executed agreements of the parties. They are raised by law for the purpose of carrying out the presumed intention of the parties, or, without regard to such intention, for the purpose of asserting equitable rights of parties or frustrating fraud, and include the two classes of trusts known generally as resulting and constructive trusts."

Digitized by Google

As the author in the first quotation says, this form of trusts is practically without limit, and is raised by a court of equity whenever, in the opinion of the court, it becomes necessary to prevent a failure of justice.

We are of the opinion that this record clearly establishes a fiduciary relation between Mrs. Weir and Mr. Berry. There can be no question that she gave him the fullest confidence as to her financial situation, and trusted in him to save her property for her, and gave him security for his advances by way of mortgages on her property. That he intended to help her, actuated by his charitable impulses, there is no doubt. He knew that she was absolutely dependent upon him to protect her from her creditors, and even for her living expenses. The fiduciary purpose which he undertook was to save to Mrs. Weir her property from loss at forced sales, and enable it to be disposed of to advantage at the best time at private sales, so that she might ultimately have the excess in value over her debts, and in the meantime provide support for her and her family. This purpose was carried out by Mr. Berry through the trust company, his agent, during his lifetime, and should now also be carried out by his administrator.

No criticism can be made of the conduct of the administrator in taking the position it has in seeking to protect the estate of Mr. Berry. But we are satisfied that, considering the manner in which the business relationship between Mr. Berry and Mrs. Weir was established, and the method of doing the business, the instant case presents just such a situation where the conscience of the court will impress on the proceeds of the sale of the property a constructive trust, and thus carry out what to the court seems necessary to prevent a failure of justice.

We are therefore in accord with the conclusion of the circuit judge that:

Digitized by Google

"There should be deducted from the amount received from Mr. Alger or the Country Club (the $165,000) all amounts paid by Berry or the Union Trust Company as administrator or otherwise for Berry, or for the preservation of the property by way of taxes, costs, interests, or expenses, up to the time that the business was closed and the money came into the hands of the Union Trust Company." And that, "after the amount chargeable against the fund of $165,000 is determined and deducted, the complainant should have a decree for the amount remaining."

We are of the opinion, however, that, in the accounting provided for in the decree of the court below, the Union Trust Company, as administrator, should be charged with such interest as it shall appear said amount due complainant has earned while in its possession, from the date of the receipt of the money from Mr. Alger or the Country Club to the date of the decree in this court. With this modification, the decree of the circuit judge will be affirmed. Neither appellant nor cross-appellant will recover costs, but costs are allowed to the other defendants against the complainant.

BROOKE, C. J., and STONE, OSTRANDER, BIRD, and STEERE, JJ., concurred. MOORE, J., did not sit.

The late Justice MCALVAY took no part in this decision.

Digitized by Google

GILCHRIST *v.* MYSTIC WORKERS OF THE WORLD.

1. INSURANCE — FRATERNAL BENEFIT ASSOCIATIONS — PROOFS OF DEATH—EVIDENCE—ACTIONS—CONDITIONS PRECEDENT.

   In an action upon a fraternal benefit certificate in which a provision appeared for the filing of proofs of death to be passed upon by the board of directors before the beneficiary should be entitled to institute suit, defendant admitted that proofs of death were filed and plaintiff, relying upon the admission, did not offer any evidence as to the proofs which she had presented. Defendant had given no notice of special defense under Circuit Court Rule 7 (*d*) requiring notice of the claim that plaintiff failed to furnish proofs of loss as provided by the policy. *Held*, that the trial court did not err in overruling defendant's motion to instruct a verdict on the ground that sufficient proof of compliance with the conditions of the policy had not been offered.

2. SAME—EVIDENCE—HEARSAY—DEATH CERTIFICATES.

   Upon the offer of the physician's certificate of death in evidence, an objection that the last sentence in the paper reading "Contributory; abortion said by deceased to have been performed by Dr. ....." was hearsay, and therefore inadmissible, was not well taken except as to the part following "abortion." The words "contributory" and "abortion" were competent evidence; appearing from the context to have been within the knowledge of the physician; and the certificate was admissible.

3. EVIDENCE—CORONER'S VERDICT.

   Where plaintiff furnished to the insurer, a benefit association, verified proofs of death and defendant requested him to forward a copy of the coroner's verdict, which he procured and forwarded, but not as part of the proofs, the contents were not an admission on his part, and were rightly excluded.

4. SAME—PRIVILEGE—PHYSICIAN AND PATIENT—INSURANCE.

   Notwithstanding a written waiver of the statutory privilege contained in a decedent's application for insurance, the opinions and testimony of her attending physicians based on facts learned while they were in attendance as pro-

Digitized by Google

fessional advisers was not admissible: the clause contained in the application was void as a waiver under Act No. 234, Pub. Acts 1909, which creates the only exception permitted by law to the general privilege prevailing as to physician and patient, and limits the right of waiver to the heirs-at-law of decedent in a will contest.

5. SAME—PRIVILEGE—WAIVER—RES GESTÆ.
Statements made by decedent, as to the cause of her death, tending to show a breach of certain conditions of the policy, made in the presence of the attending physicians and nurse were not admissible as part of the *res gestæ*, though the admission to the nurse was competent, and should not have been treated as privileged.

6. SAME—EXPERT TESTIMONY.
Testimony tending to establish a breach of the benefit certificate, in that insured had submitted to an abortion, was sufficient to require the case to go to the jury, and, if believed, to warrant a verdict for defendant.

Error to Mecosta; Barton, J. Submitted October 4, 1914. (Docket No. 94.) Decided October 29, 1915. Rehearing denied April 21, 1916.

Assumpsit by William H. Gilchrist against the Mystic Workers of the World upon a benefit certificate. Judgment for plaintiff, on a directed verdict. Defendant brings error. Reversed.

Butler & Everett and *Charles E. Sturtz*, for appellant.

Albert B. Cogger and *Broomfield & Worcester*, for appellee.

OSTRANDER, J. The facts in the case, stated briefly, are as follows: Defendant, a fraternal beneficiary insurance corporation, of the State of Illinois, doing business within this State, issued the benefit certificate in question November 8, 1912, to Grace P. Gilchrist, a member of the order. Plaintiff, her husband, was named as beneficiary in said certificate. This certifi-

Digitized by Google

cate was issued upon a written application signed by Grace P. Gilchrist, dated October 18, 1911. She died May 29, 1913. Later, proof of her death was duly filed with the proper officers of defendant corporation, and, payment having been refused, this suit was brought. Defendant, under the plea of the general issue, gave notice of certain matters of defense, to which such reference as may be necessary will be given. On the trial, at the close of plaintiff's case, a motion made by the defendant for a directed verdict in its favor was denied. Defendant then proceeded with its defense, and when it rested counsel for plaintiff made a like motion for an instructed verdict. This motion was granted.

It was admitted by defendant upon the trial that the certificate in question was issued; that plaintiff was the beneficiary named in it; that the deceased wife at the time of her death was a member of the order in good standing; that proofs of death and claim of benefit were filed in due time and were passed upon by the proper officers; that the claim was not paid, and suit was afterwards brought. Counsel for both parties reserved the right to object to any exhibits offered on the ground of materiality, competency, or relevancy. Plaintiff offered the beneficiary certificate sued upon in evidence and desired to read it into the record. Counsel for defendant objected to admitting the certificate in evidence unless there was put in evidence with it, as a part of it, the application, medical examination, and warranties contained therein, and also certain sections of the constitution and by-laws of the order, insisting that the plaintiff must introduce the entire contract, and not a part of it; that by the certificate all of these documents were made a part of the contract. Plaintiff insisted that the suit was based on the certificate, and the other papers were not a part of his case. After some colloquy between court and

Digitized by Google

counsel these papers, which were in the possession of the defendant, were produced and given to plaintiff's counsel and handed to the court by him, with the remark that they were to be received in evidence and considered only in the light of the defendant's notice under the plea in the case, and could only be used to support the notice under the plea. Counsel for plaintiff also offered the proof of death, which was objected to and withdrawn on account of the admission already made by defendant's counsel that the proofs of death were filed within the time provided by the by-laws. Plaintiff then called the mother of Mrs. Gilchrist, deceased, and made proof that she died in the hospital May 29, 1913, and then rested his case. Defendant then made the motion for a directed verdict already mentioned, on the ground that plaintiff had put in no evidence as to the kind or character of death proofs which were submitted to the grand lodge, required by the insurance certificate, as follows:

"(5) No action can or shall be maintained on this certificate until after the proofs of death and the claimant's right as provided for in the laws of this order have been filed with the supreme secretary and passed upon by the board of directors, nor unless brought within one year from the date of the death of the member,"

—and also that the certificate offered in evidence was but a part of the contract. This motion was denied, defendant excepted, and the trial proceeded.

The special defenses under the notice given under the plea are of great length. The material allegations necessary to be considered may be stated as follows:

First. That the beneficiary certificate by its terms included the written application for membership and benefits, the medical examination, and the constitution and by-laws of the order; that statements in the application for membership and medical examination were made warranties and the basis and consideration for

Digitized by Google

issuing the beneficiary certificate; that the application for membership contained a waiver for the member and her beneficiary of all privilege or benefit disqualifying any physician from testifying concerning information obtained about her in a professional or other capacity, and also the provisions of all laws which would conflict with such agreement.

Second. The application and the beneficiary certificate contained agreements that, if the member entered into certain prohibited business, or committed a felony, or within three years took his own life, whether sane or insane, or death was caused by the violation or attempted violation of any laws of the State, territory, or country in which he might be, the certificate would be forfeited.

Third. That plaintiff's decedent came to her death by procuring and consenting to an abortion and miscarriage which was performed upon her; she being then pregnant.

In making such defenses counsel for defendant offered in evidence the certificate of death of Grace P. Gilchrist to prove the cause of death. This was a certified copy of the certificate of death which had been filed with the secretary of State, made by the attending physician, required by statute before a burial permit can be issued. This was objected to as incompetent and hearsay, that proof of cause of death cannot be made by a witness who is not sworn and subjected to cross-examination, and it states a fact not within the personal knowledge of the doctor. This certificate contains in all 20 subdivisions. It is necessary to give but the seventeenth:

"(17) I hereby certify that I attended deceased from May 25, 1913, to May 29, 1913; that I last saw her alive on May 29, 1913; and that death occurred on the date stated above, at 10 p. m. The cause of death was as follows: Peritonitis. Duration, five days.

"Contributory. Abortion, said by deceased to have been performed by Dr. ————."

Digitized by Google

This was signed by the attending physician. We have copied the cause of death from the original return, which differs slightly from the printed record. The objectionable portion was the last sentence. The court sustained the objection excluding the last sentence following the word "peritonitis." To this ruling counsel for defendant took an exception. After some colloquy between the court and counsel for defendant, the certificate of death was withdrawn, counsel stating:

"We would like the record to show that by withdrawing the death certificate offered in evidence we do not waive the right to the exception to the ruling of the court refusing the defendant the admission of the death certificate in evidence to show the cause of death.

"*The Court:* It is understood that you are to have the benefit of an exception to my ruling."

In the trial of a case the withdrawal of evidence offered leaves nothing for the court to pass upon. However, from what we have just quoted, we think it may be fairly understood counsel for defendant did not so understand this withdrawal, and the court was evidently of the same opinion. Therefore we are constrained to consider the error assigned upon this exception in its order.

Defendant next offered in evidence a certified copy of the coroner's verdict for the purpose of showing the cause of death of deceased, and claiming the same was a part of the proof of death voluntarily submitted by plaintiff, and, therefore, an admission on his part of the cause of death. Counsel for plaintiff contended that the record shows this was not furnished voluntarily by plaintiff as part of proof of death, but was afterwards requested by defendant, and objected to its receipt in evidence for the reason that it was incompetent and immaterial. The objection was sustained, and the paper excluded, to which defendant excepted.

Digitized by Google

On the part of the defense there was next introduced the testimony of two physicians who attended the deceased during her last sickness, by which witnesses it was sought to show that death had been produced by an abortion, and also to show by them statements made by the deceased to each of them relating how the abortion was caused. The witnesses testified as to the condition of the patient when they attended her and the extent of the examination of her person made by them whereby they obtained knowledge of her physical condition. This testimony is of great length, and for the purposes of this case need not be quoted. The substance of the testimony of both of them was that each found that the patient was suffering from peritonitis, and there was found evidence of a miscarriage or abortion. The examinations were separate, but made on the same day; the second physician being called because the regular physician could not be found. Neither of them knew the cause of the abortion, and from the examination made by each neither could testify what was its cause. Both testified that abortions occurred from diseases and other causes, such as injuries to the person. Each was allowed to testify, over the objection of counsel for plaintiff, that in his opinion this was a "produced abortion." During the taking of the testimony of each of these physicians many exceptions were taken by defendant's counsel to the rulings of the court excluding certain questions. However, the testimony of each culminated in the opinion of each that this was a "produced abortion," which was allowed by the court. Exceptions were also taken on the part of defendant to the rulings of the court in not permitting these witnesses to testify as to statements made by deceased as to how the abortion was produced.

The testimony of the hospital nurse who attended deceased after she was admitted to the hospital was

Digitized by Google

then offered by defendant. Counsel for defendant offered to show by this witness that she was present when the statement was made by deceased to one of her attending physicians, in answer to his question as to how and where the abortion was produced. This was objected to as incompetent and hearsay. This same testimony offered and objected to on the part of the physicians was put upon the ground that it was part of the *res gestæ*. The objection was sustained, and an exception taken. Thereupon, on the part of defendant, counsel offered in evidence sections 11502 and 11503, 3 Comp. Laws, and rested. Counsel for plaintiff then moved the court to direct a verdict in his behalf, for the reason that defendant had introduced no evidence or made any defense to overcome the *prima facie* case presented by plaintiff.

The errors assigned and relied upon by defendant are based upon the exceptions which have already been noted, and are presented in defendant's brief under seven groups:

First. Conditions precedent. Defendant first insists that the court was in error in overruling defendant's motion for a directed verdict because plaintiff had not complied with the provision in the certificate sued upon, and contends:

"That it is a condition precedent to the right of recovery in this case that satisfactory proofs of death must be filed with the company before the right of action on the part of the beneficiary accrues."

As appears in our statement of facts, it was admitted on the part of defendant that these proofs of death and of plaintiff's claim (not admitting that they were satisfactory) were filed in season, received by the proper officers, acted upon, and payment refused. A reading of subdivision "*d*" of Circuit Court Rule 7 clearly shows that:

If the defendant "in a suit upon a policy of insur-

Digitized by Google

ance, * * * shall rely * * * upon the failure to furnish any proof of loss, as required by the policy, there shall be added to the plea a notice plainly indicating the facts relied on."

This was a matter of defense to this policy under our practice. Therefore this defense was not open to defendant, because it gave no notice thereof. *O'Neill* v. *Assurance Co.*, 155 Mich. 564 (119 N. W. 911); *Lessnau* v. *Catholic Order of Foresters*, 163 Mich. 111, 119, 121 (128 N. W. 201), and cases cited. The court was therefore not in error.

Second. Death certificate. Error is also relied upon because of the ruling of the court in excluding the last sentence in the death certificate. This sentence reads:

"Contributory. Abortion, said by deceased to have been performed by Dr. ————."

The objection was that this was hearsay, and therefore incompetent, and not a proper part of the certificate required by the statute. We are of opinion that the certificate properly included the words "Contributory. Abortion." A fair interpretation of the certificate is that the contributing cause of death was within the knowledge of the physician, and was not hearsay. The remainder of the certificate was hearsay. The proper certificate was admissible under the statute. *Krapp* v. *Insurance Co.*, 143 Mich. 369 (106 N. W. 1107, 114 Am. St. Rep. 651).

Third. Coroner's verdict. Defendant contends that the court erred in excluding the coroner's verdict, which was offered in evidence by defendant, and claims that it was admissible as an admission, because it was furnished to defendant by plaintiff as a part of the proofs of death. We do not think the testimony in the case warrants such a conclusion. All of the proofs of death furnished by plaintiff were verified June 6th and forwarded and filed with the defendant June 9th. Plaintiff under the statute was called by defendant

Digitized by Google

for cross-examination and testified he furnished all proofs of death the local lodge required. The record shows that this was on June 6, 1913. On July 14th following, he procured and sent a copy of the coroner's verdict at the request of defendant. This was not furnished by plaintiff as part of his proofs of death. It was not furnished by him voluntarily and was no admission by him of its contents. *Wasey* v. *Insurance Co.*, 126 Mich. 119 (85 N. W. 459). The court was not in error in excluding it.

Fourth. Opinions of attending physicians. As already stated, the facts concerning which the attending physicians testified were obtained by them in their professional capacity while attending deceased as their patient, and, unless this case is an exception to the general rule, such knowledge was privileged. Some of these assignments of error which relate to the exclusion of testimony above described which, under ordinary circumstances would be considered privileged, as having been obtained in a professional capacity, are claimed to have been admissible because of the waiver by deceased of the statutory privilege prohibiting the disclosure by attending physicians of information obtained while acting as such, which waiver was contained in the application of deceased for the beneficiary certificate. Our statute which prohibits a disclosure of such information on the part of a physician was amended by Act No. 234, Pub. Acts 1909, by adding a proviso as follows:

"Provided, that after the decease of such patient, in a contest upon the question of admitting the will of such patient to probate, the heirs at law of such patient, whether proponents or contestants of his will, shall be deemed to be personal representatives of such deceased patient for the purpose of waiving the privilege hereinbefore created."

This amendment to our statute provides but one exception to the prohibition created by the section, and

Digitized by Google

that is in a contest upon the question of admitting the will of such person to probate where the parties to the contest shall be deemed to be personal representatives of such deceased for the purpose of waiving the privilege thereinbefore created. In New York the code was amended very much as our statute has been, except it provided in terms that such waiver could be made by the personal representatives of the deceased patient only upon a trial or examination. In the case of *Holden* v. *Insurance Co.*, 165 N. Y. 13, 17 (58 N. E. 771), that court, passing upon the question of an express waiver of this kind contained in an application for a life insurance policy, held:

"Under the statute as amended, no one except the personal representatives of the deceased * * * can waive the provisions of section 834, and it can be waived by them only upon the trial or examination where the evidence is offered or received. The apparent purpose of that amendment was to protect parties, their representatives and successors from waivers which should be inadvertently or improperly obtained previously to the trial of an action or examination of the witness," *et seq.*

Our statute creates an absolute privilege, with but one exception, where a waiver may be made by the representatives of the deceased patient, and that only in a contest upon the question of admitting the patient's will to probate. Our statute, therefore, contains the more stringent prohibition, and the patient's waiver of the privilege was of no force or effect. *Holden* v. *Insurance Co., supra.* It has been the policy of the legislature and the courts of this State to protect this privilege. The waiver contained in the application was therefore against public policy and void, and the testimony of the attending physicians as to all knowledge obtained by them in such capacity was properly excluded. This includes all of the testimony of the physicians as to matters which were obtained from

Digitized by Google

deceased in their professional capacity, together with their opinions based upon such information.

Fifth. Alleged statements of deceased. It is contended on the part of defendant that certain alleged statements of deceased made to these physicians and to one of them in the presence of a nurse should have been admitted, claiming they were admissible because of the waiver clause and because they were part of the *res gestæ*. We have already disposed of the contention relative to the waiver clause, and nothing more need be said in that regard, nor do we think they could be regarded as part of the *res gestæ*. The testimony of the nurse was admissible in so far as it stated an admission by the insured of the cause of her ailment. The statute does not exclude the testimony of the nurse. It was the life of the deceased which was insured. Plaintiff, as beneficiary, can recover only according to the contract which she made with defendant. If she admitted a breach of it which would avoid it, he ought not to recover.

Sixth. Expert testimony. Errors assigned under this subdivision of defendant's brief are already disposed of by what has been said in this opinion relative to the waiver of deceased of her statutory privilege and the exclusion of alleged statements of deceased.

Seventh. Direction of verdict for plaintiff. As has been indicated, we are of opinion that there was some testimony within the notice of the defenses relied upon tending to prove that the policy was avoided. It follows that the court was in error in granting the motion of plaintiff and directing a verdict in his behalf.

The judgment of the circuit court is therefore reversed, and a new trial granted.

BROOKE, C. J., and KUHN, STONE, BIRD, MOORE, and STEERE, JJ., concurred.

The late Justice MCALVAY took no part in this decision.

Digitized by Google

WILK *v.* BLACK.

1. PHYSICIANS AND SURGEONS — MALPRACTICE — NEGLIGENT TREATMENT.

   Where plaintiff, after sustaining a fracture of his left arm, employed defendant to reduce it, and after wearing the splints two weeks found, as he claimed, a bunch on the inner side of the arm, caused by defendant's failure to properly treat it and where there was evidence of a medical expert that the splints used by defendant were too short, the court did not err in submitting to the jury the question of fact as to malpractice, though defendant disputed the claim of plaintiff.

2. SAME.

   And where defendant's counsel, at the trial, made no complaint that the court had omitted any instructions to the jury, and there was testimony tending to show want of sufficient skill, the charge submitting to the jury the question of negligence in possessing or exercising reasonable skill was not open to objection, on error.

3. DAMAGES—WEIGHT OF EVIDENCE—EXPECTANCY.

   There was no abuse of the discretion vested in the trial court in denying defendant a new trial on the ground of excessive damages upon testimony tending to show that his expectancy was upwards of forty years, and that the arm was crooked, the verdict amounting to $2,250, in a malpractice suit.

Error to Muskegon; Sullivan, J. Submitted April 15, 1915. (Docket No. 98.) Decided October 29, 1915.

Case by Edward Wilk against Benjamin F. Black for malpractice. Judgment for plaintiff. Defendant brings error. Affirmed.

Cross, Vanderwerp, Foote & Ross, for appellant.

Nichols & Shaw and *Charles G. Turner,* for appellee.

Digitized by Google

MOORE, J. This action was brought to recover damages for malpractice. On October 13, 1911, plaintiff, a farmer boy of 22 years of age, was thrown from a horse, thereby sustaining a fracture of the ulna and radius of the left forearm. The accident happened about 4:30 p. m. at a farm eight miles from the village of Holton, where the defendant was practicing his profession. Within two or three hours after the accident the defendant treated the fracture. Plaintiff returned the following Monday, when defendant examined the arm without taking off the splints and told the boy the arm seemed to be all right, and to be careful with the arm and come again in about two weeks. Plaintiff made his next and last visit to defendant on November 2d, at which time the splints were removed, the arm examined, and the defendant claims he found it to be perfect, the bones straight and in normal condition. Defendant assured the boy that the arm was coming on all right and directed plaintiff to come back again in two weeks and he would take off the splints. The plaintiff claims that at this time there was a lump on the arm.

The plaintiff testified:

"Why, he told me to come back in a week or two and he would take the splints off, and I told him it was quite a ways to come; if that was all that was necessary, if I could take them off myself; and he said I could, and I did at the end of two weeks' time."

Defendant testified:

"I told him to come back in two weeks again, and he said to me, 'Now, Doctor,' he said, 'it is a long ways from my place up here'—he lives down here near Muskegon, nearer Muskegon than Holton, between Muskegon and Holton—and he said, 'What will be the matter with me taking those splints off in two weeks' time, and if the arm is all right, will it be necessary for me to come back? Well, with the arm in the condition it was in when I saw it, I said to him, 'In two weeks' time you can take those splints off if you want to and

Digitized by Google

if you are satisfied the arm is all right, you needn't come back; if you aren't, I want you to come right back'; and he told me he would."

Plaintiff never returned to defendant until several months thereafter, when he came to demand a settlement, being accompanied by his attorney, who exhibited an X-ray plate showing a shadow picture of the plaintiff's arm taken on May 13, 1912, which plate was produced in the Supreme Court upon the argument.

Plaintiff claims to have worn the splints continuously from the time of his last visit to defendant until the morning of November 28th, when he took them off and discovered a bunch on the inner side of his arm, and immediately went to consult Dr. Thomas, at Muskegon, who examined the arm and found a prominence of from one-half to three-quarters of an inch high, which he supposed to be an enlarged callous. Dr. Thomas recommended an X-ray examination, put a leather band on the arm to be worn in the meantime, and told plaintiff to go at once to Dr. Black and show him the arm. This, however, plaintiff failed to do, claiming that he had lost confidence in defendant, and on cross-examination he stated he had heard of other instances where the defendant had done poor work.

The defendant claimed he had properly treated the arm, and that its condition when suit was brought was caused by one of three things: (1) That plaintiff injured his arm by working after the injury; (2) that plaintiff injured his arm while it was in splints on the way home from a dance; (3) that plaintiff removed the splints himself, and thus caused the injury. The defendant offered testimony tending to show the truth of these claims. The plaintiff denied that any one of them was true.

The trial judge charged, after stating the claims of the respective parties, in part as follows:

Digitized by Google

"Now, I will say to you, gentlemen, that when a patient goes to a doctor and accepts the professional skill of a doctor, it is the duty of the patient to follow the advice of the doctor, and if he fails to follow the advice of the doctor and something untoward happens to the patient which would not have happened or which was not the result of the doctor's negligence at all, if something untoward happens to the boy, in such a case as that the doctor wouldn't be liable. It is the duty of the plaintiff to show you by a fair preponderance of the evidence that the injury, if any, to his arm, was not caused by any fault on his part after the arm was set. The burden rests upon the plaintiff all along through. * * *

"I instruct you that, if a person holds himself out to the public as a physician and surgeon, he must be held to possess and exercise ordinary skill, knowledge, and care in his profession. * * * And where an injury results from a want of ordinary skill or attention in the treatment of a case the physician or surgeon is held responsible for such injury. You should notice that I said the physician should exercise the ordinary skill, knowledge, and care required of men in his profession in his treatment. The physician is not required to possess or exercise the highest degree of care and skill known to the profession in order to relieve him from liability; only reasonable care and skill is required, that is, such care and skill as is possessed by men of his profession in general, and I will add to that at least the average degree of knowledge and skill possessed and executed by the members of their profession generally in the locality in which they practice.

"If Dr. Black did not treat the plaintiff with such ordinary care and skill as I have defined to you, he would be guilty of negligence, and if damage resulted therefrom without fault or negligence on the part of the plaintiff, the plaintiff would be entitled to a verdict at your hands. Should the evidence fail to show that the defendant did not exercise ordinary care and skill in the work he did for the plaintiff, then he would not be guilty of any negligence, and your verdict should be for the defendant."

Digitized by Google

The jury returned a verdict in favor of the plaintiff in the sum of $2,250. A motion for a new trial was made and denied. From a judgment on the verdict the case is brought here by writ of error.

The important question is: Was there evidence of negligence sufficient to carry the case to the jury? The law which should govern cases of this character is not new to this court. It is stated in various ways in *Hyatt* v. *Adams,* 16 Mich. 180; *Hitchcock* v. *Burgett,* 38 Mich. 501; *Brown* v. *Marshall,* 47 Mich. 576 (11 N. W. 392, 41 Am. Rep. 728); *Farrell* v. *Haze,* 157 Mich. 374 (122 N. W. 197); *Rogers* v. *Kee,* 171 Mich. 551 (137 N. W. 260), and the very recent cases of *Duffy* v. *Charters,* 180 Mich. 572 (147 N. W. 541), and *Miller* v. *Toles,* 183 Mich. 252 (150 N. W. 118, L. R. A. 1915C, 595). The questions involved are not so much law questions as they are of fact.

The defendant, when testifying in his own behalf, described the fracture:

"Why the arm was bent, as I said yesterday, a green stick fracture. * * * The bones were not broken off; it was not a complete fracture. They were bent. * * *

"*Q.* And what opportunity was there for the bandage to slip or loosen?

"*A.* I don't think there was any.

"*Q.* Whether or not there was sufficient swelling of the arm at that time that when the swelling again reduced it would loosen the bandage?

"*A.* There was not.

"*Q.* Was the swelling a perceptible one at the time you reduced the fracture?

"*A.* No, sir."

On the recross-examination he said:

"There was scarcely any swelling in the arm when I first saw it; I would say none. In a green stick fracture there is very seldom much swelling. There isn't the same irritation that there is in a dry stick fracture. In Mr. Wilk's case there was practically no swelling."

Digitized by Google

The X-ray picture showed a complete fracture of the bones, and defendant introduced testimony to which reference has already been made which, if true, might account for this contention, even though the fracture was a green stick fracture; but plaintiff introduced testimony disputing in the most positive terms this testimony. There was testimony of an expert that the splints used were not long enough. We have already referred to the testimony of the plaintiff as to the condition he observed at the last visit, when he was assured his arm was all right. We have not overlooked the claim that he gave a different version of what occurred. Without stopping to go into detail, we think the court very properly concluded there was a case for the jury.

Some criticism is made of the charge of the court. We quote from the brief:

"We especially complain that the court erred in charging and instructing the jury as follows: 'The plaintiff claims that he engaged Dr. Black to set the bones in his arm, that the doctor, owing to the lack of skill such as an ordinary physician and surgeon practicing his art should have, did not properly set the bones in the arm, and so in undertaking to set it he was negligent, because he did not possess the requisite skill such as a doctor should have.' By this and subsequent language complained of in our assignments of error on this branch of the case the jury were left to determine, as a disputed question of fact, a matter with respect to which there was no evidence whatever."

We have quoted other portions of the charge.

Counsel did not proffer any written requests. Nearly at the conclusion of his charge the judge inquired of counsel, "Is there anything I have overlooked?" and there was no suggestion made by counsel for appellant that the court had not properly charged the jury in relation to the skill of the doctor. We cannot agree with counsel in his claim that the skill of the doctor

Digitized by Google

was not in issue. It was put in issue by the pleadings. It has already appeared that there was testimony that when he first set the arm he used splints that were too short. There was also testimony that on the last visit the plaintiff made the doctor assured the plaintiff his arm was all right, when, in fact, a bunch or prominence had appeared upon the arm showing it needed further attention. The doctor testified the fracture was a green stick fracture. The plaintiff testified he had done nothing to change the character of the fracture, while the X-ray plate showed a complete fracture.

There was no reversible error in the charge.

Should a new trial have been granted because the verdict was excessive? There was testimony that the arm would always be crooked. The expectancy of the life of plaintiff was 40 years or more. We cannot say the trial judge abused his discretion. *Turnbull* v. *Richardson*, 69 Mich. 400 (37 N. W. 499); *Kinney* v. *Folkerts*, 84 Mich. 616 (48 N. W. 283); *Shaw* v. *Railway Co.*, 123 Mich. 629 (82 N. W. 618, 49 L. R. A. 308, 81 Am. St. Rep. 230); *Retan* v. *Railway Co.*, 94 Mich. 146 (53 N. W. 1094).

Judgment is affirmed.

BROOKE, C. J., and KUHN, STONE, OSTRANDER, BIRD, and STEERE, JJ., concurred.

The late Justice MCALVAY took no part in this decision.

Digitized by Google

PARSILLE v. BROWN.

1. TRIAL—DIRECTING VERDICT—PRACTICE—REASONS.
   Reasons for the direction of a verdict should be stated by the trial court.

2. SAME—STATUTES.
   The direction of a verdict constitutes a charge within the purview of the statute. 3 Comp. Laws, § 10247 (Act No. 101, Pub. Acts 1885).

3. SAME—CHARGE—DIRECTED VERDICT.
   An assignment of error that the court erred in taking the case from the jury may properly be construed to mean that the testimony presented a question of fact and that the court erred in directing a verdict for the appellee.

4. EQUITY — JUDICIAL BONDS—VALIDITY—JUDGMENTS—COLLATERAL ATTACK.
   Plaintiff brought an action upon a judicial bond given in chancery proceedings that he had instituted to have a receiver appointed for crops grown upon lands held by the obligor, his tenant. Defendant had taken his appeal from the order of restitution of the circuit court commissioner and had given an appeal bond in the sum of $1,200. The crops were worth over $1,900, and the landowner, deeming the bond insufficient, asked for a receiver. By the decree, upon complainant's bill therefor, a receiver was appointed by the court to take possession of any crops that might be grown on the premises unless the tenants should furnish a sufficient bond, as security, which defendant filed. Defendant contended that it was invalid because the court had no jurisdiction, the remedy at law being adequate and complete, and that the order appointing a receiver was void, for want of equitable authority. *Held*, that the court did not exceed its jurisdiction and that the bond was valid, that the order for a receiver was also within the equitable power of the court, and, no appeal having been taken, was not subject to collateral attack.
   BIRD, J., dissenting.

Error to Chippewa; Fead, J. Submitted April 27, 1915. (Docket No. 151.) Decided October 29, 1915.

Debt by Herbert L. Parsille, for the benefit of David Brown, against Hugh Brown and others on a judicial

Digitized by Google

bond. Judgment for plaintiff. Defendants bring error. Affirmed.

Albert E. Sharpe, for appellants.

John W. Shine, for appellee.

OSTRANDER, J. The suit is upon a bond. The trial by the court and a jury resulted in a verdict for the plaintiff directed by the court. The court properly (*Demill* v. *Moffat,* 45 Mich. 410 [8 N. W. 79]; *Bergstrom* v. *Staples,* 82 Mich. 654, 657 [46 N. W. 1035]; *Rayl* v. *Hammond's Estate,* 95 Mich. 22 [54 N. W. 693]; *Howey* v. *Fisher,* 111 Mich. 422, 424 [69 N. W. 741]; see, also, *Tillotson* v. *Webber,* 96 Mich. 144, 153 [55 N. W. 837]; *Hanley* v. *Balch,* 106 Mich. 46 [63 N. W. 981]), stated the reasons for directing the verdict. One reason, the principal one, was that the admissions of defendant Brown in his testimony, and other uncontradicted testimony, required it. Defendants had moved for a directed verdict in their favor. A bill of exceptions was settled, but there are no exceptions—at least none are noticed in the index to the record, and none are referred to in the brief for appellants. It is assigned as error that a verdict was so directed, and that one was not directed for defendants, and it is assigned as error that the court refused certain instructions asked for by defendants, and refused defendants the right to introduce certain testimony. Counsel for appellee contends there is nothing for this court to review.

The statute (3 Comp. Laws, § 10247), as amended by Act No. 52, Pub. Acts 1901, permits errors to be assigned upon the charge of the court. It was suggested at the hearing, *arguendo,* that the direction of a verdict was a charge, within the meaning of the statute. The statute was passed in 1885 (Act No. 101). Both before and after its enactment, in *Demill* v. *Moffat,* in *Rayl* v. *Hammond's Estate,* and in *Hanley*

Digitized by Google

v. *Balch, supra*, this court spoke of the direction as a charge, which in effect it is. The rule that reasons should be given by the trial court for directing a verdict supports the conclusion that a directed verdict ought to be treated as a charge, and we hold that it is a charge within the meaning of the statute referred to.

The single assignment of error based upon the charge is the one that the court erred "in taking the case from the jury and directing a verdict for the plaintiff." What question of law is presented by this assignment when read with the charge? It is naturally construed to mean that a question of fact was presented by the testimony, for which reason a directed verdict was improper. When the record is examined it is found that, while requesting a directed verdict, defendants also claimed, if a directed verdict in their favor was refused, the right to go to the jury upon the question of what, if anything, was due defendant Hugh Brown from one David Brown, as affecting the amount of plaintiff's recovery. Turning to the brief for appellants, we find the following:

"The theory of the defense in this case in the circuit court was that this bond was void and uncollectible for lack of consideration, and because the circuit judge had no authority to order it given. The further defense was made that there was no breach of the terms of the bond proven in the case; that if the bond were valid, there could be no liability upon it until David Brown had exhausted his remedy on the regular appeal bond given to the circuit court commissioner, on which the penalty was $1,200, which was estimated at double rental value of the land. It was further claimed that the bond was void upon its face for lack of express consideration. These questions were all clearly brought before the court by defendant's requests to charge, and our assignments of error are based principally on the refusal of the court to give these requests, and on his direction of a verdict in favor of plaintiff."

Digitized by Google

It appears that from a judgment of restitution of certain premises, in favor of David Brown, Hugh Brown appealed to the circuit court. Pending a trial in that court, David Brown filed a bill in equity, praying, among other things, for a receiver for the crops for the then current year (1913), the proceeds to abide the further order of the court. An answer was filed. An order was made that a receiver be appointed, unless Hugh would give a bond to the clerk of the court to account for the crops. The bond was given. It runs to Herbert L. Parsille, clerk of the circuit court for the county of Chippewa, his successors and assigns. It is conditioned as follows:

"The condition of this obligation is such that in case David Brown shall recover possession from the said Hugh Brown of the east half (E. ½) of the southwest quarter (S. W. ¼) and the west half (W. ½) of the southeast quarter (S. E. ¼), except that part west of the Mackinaw Road and that part of the W. ½ of the S. W. ¼ lying east of the Mackinaw Road, of section twenty-five (25) in town forty-seven (47) north of range one (1) west, or shall be adjudged entitled to the possession thereof, or in case William Godfrey shall recover possession of said lands, the said Hugh Brown will account for and pay over to the said clerk the proceeds of all the crops grown on said lands for the year 1913, less such sums as may be allowed by the court for harvesting and marketing the same, to be disposed of as the court shall direct and if the said Hugh Brown shall suffer no waste in respect to said farm and shall care for and harvest the said crops in proper shape and in good and workmanlike manner and shall afford such person as may be agreed on by counsel or appointed by the said clerk of this court, at the expense of said David Brown, opportunity to be present at the baling of the hay and the threshing of the grain grown on said farm, then this obligation to be void, otherwise to be and remain in full force and effect."

Hugh held the land until October 1st, harvested the crops, but did not account for them. They were worth

Digitized by Google

$1,900. It appears, further, that before the action to recover possession was heard by the circuit court commissioner, Hugh Brown, the defendant therein, applied to the circuit court, in chancery, for an injunction to restrain the proceedings to obtain restitution, claiming that he had no legal defense to the action. The application was denied. The farm consisted of 160 acres of improved land; the crops were hay and 20 acres of oats. The term of court to be held next after the appeal from the commissioner's judgment was the September term. Hugh Brown gave a bond on appeal in the sum of $1,200, fixed by the commissioner as twice the rental value of the land.

It is said in argument that the bond is void as given without consideration, and because the order for a receiver was void. Without admitting that the single assignment of error available to the appellants presents the rulings upon these points for review, we may say that it does not appear that the order for the receiver was intended, or was necessarily calculated, to oust the tenant from possession of the land or its management, or to transfer the possession of personal property. The court making the order seems to have been convinced, not upon an *ex parte* application, but upon a hearing, that the proceeds of the crops ought to be preserved, so that the person finally found to be entitled to them could have them. To what extent the court was affected, or should have been, by the fact that an appeal bond had been given, we cannot tell. We hold only that the order for a receiver was not void. It was not appealed from. The bond was given, and there has been a breach of its conditions, so that by its terms, and the testimony, the plaintiff, the clerk of the court, was entitled to recover upon it the entire penalty. The money, when paid, will stand in the place of the proceeds of the crops, in the custody of the clerk.

Digitized by Google

No reversible error appears, and the judgment is affirmed.

BROOKE, C. J., and KUHN, STONE, MOORE, and STEERE, JJ., concurred with OSTRANDER, J.

BIRD, J. (*dissenting*). Hugh Brown was in the possession of David Brown's farm, under a contract of purchase. David claimed Hugh's rights had expired thereunder, and demanded that he vacate. Hugh refused to go. David commenced proceedings before a circuit court commissioner to oust him, and obtained a judgment for restitution. Hugh appealed, and gave the statutory bond in double the amount of the rental value of the farm. David then filed a bill on the chancery side of the court for the appointment of a receiver to preserve the crops and the proceeds thereof. Hugh filed an answer, and the chancellor on a preliminary hearing ordered the appointment of a receiver in case a bond was not given, in the sum of $1,400, to cover the value of the growing crops. This is the bond upon which judgment was rendered in this suit.

I am unable to agree with Mr. Justice OSTRANDER that the judgment in this case should be affirmed. In my opinion the chancery court which ordered the bond in suit was without jurisdiction, because David Brown had an adequate remedy at law. He conceived that he had a grievance, and he selected a court of law himself in which to have that grievance redressed. He obtained the relief which he sought. Then why should he be permitted to have further redress in a court of equity? The only answer appears to be that the bond ordered by the commissioner was inadequate. If it were, he should have so protested at the time and introduced proof before the commissioner to show that the rental value was larger than the amount proposed to be fixed in the bond. He did not do this. He made no motion afterwards to have the penalty

Digitized by Google

enlarged; therefore we must conclusively presume that the rental value was properly fixed by the commissioner. The bond of $1,200 ordered by the commissioner covered the rental value. After this there was no occasion for a court of chancery to order another bond to cover the value of the crops. If Hugh paid the rental value, he was entitled to the crops, because the value of the crops was the principal factor in determining the rental value. It cannot be possible that he was liable for both, the rental value plus the value of the crops. If under the circumstances of this case the complainant was entitled to further relief in a court of equity, it establishes a new rule which may be followed in every case where the penalty in the appeal bond is fixed at a sum smaller than the complainant thinks it ought to be. The chancery proceedings must necessarily have shown upon their face that the plaintiff had an adequate remedy at law, and that he had pursued it. When this appeared, the chancellor should have dismissed the proceedings because this objection goes to the jurisdiction of the subject-matter.

The judgment should be reversed, and no new trial ordered.

The late Justice MCALVAY took no part in this decision.

Digitized by Google

BRETZ *v.* HITCHCOCK.

1. TAXATION—NOTICE TO REDEEM—RECONVEYANCE.
   Where the tax title owner made out a *prima facie* case by introducing proof of the service of a notice to redeem, and the defendants met the same by evidence that the owner had died several days before the notice was shown to have been served, the defendant had fully rebutted the case of complainant who was not entitled to equitable relief.

2. SAME—EVIDENCE—PRIOR YEARS.
   Some proof must be presented as to the amounts of taxes for other years paid as a condition of the tax purchase, and included in the notices served, which are not *prima facie* proof of the said amounts or years. The burden of proof is on the complainant to show a valid title and service of a proper notice.

3. SAME—ESTATES OF DECEDENTS—DESCENT—SERVICE OF NOTICE ON HEIRS, ETC.
   Service of notice to redeem on the heirs of a deceased made, as to one, the day after complainant filed his bill, and as to the other only a few days before commencement of suit, so that the return of service was not filed until after suit was begun, was not sufficient to confer jurisdiction to quiet title.

4. SAME.
   The owner of the record title, who permits his lands to be sold for taxes, is not entitled to an accounting for timber removed by the purchaser of the tax title interest until he redeems, since the holder of the record title has only a bare right to reconveyance.

Appeal from Chippewa; Fead, J. Submitted April 28, 1915. (Docket No. 96.) Decided October 29, 1915.

Bill by Charles W. Bretz against Roxanna G. Hitchcock and others to quiet title to real property. Defendants filed a cross-bill for an accounting. From a

Digitized by Google

decree dismissing both bill and cross-bill both parties appeal. Affirmed.

Merlin Wiley (*Sherman T. Handy*, of counsel), for complainant.

D. W. Closser (*Davidson & Hudson*, of counsel), for defendants.

BROOKE, C. J. The somewhat complicated facts involved in this proceeding are clearly set forth by the learned circuit judge who heard the case, together with his legal conclusions, in the following opinion:

"Complainant brings this action to quiet title to the S. W. ¼ of the N. W. ¼ of section 31, township 45 N., range 2 W., in Chippewa county, Mich. He claims title as grantee of one John B. Anderson, tax title owner by virtue of a tax deed executed by the auditor general to said Anderson and dated February 27, 1904, upon a sale of the premises made February 23, 1904, for the taxes of 1895, 1896, 1897, 1898, and 1899, together with certain tax notices based thereon and claimed to have been served by Anderson and by complainant on the several parties in interest. The conveyance from Anderson to complainant was by quitclaim deed, dated January 27, 1906, and recorded March 13, 1906. At the time of the service of the notices by Anderson, the parties interested in the premises, as shown by the records, were Charles Fitzhugh, Jr., Archibald McDonell, Mendel J. Bialy, and Joseph R. Hitchcock, owners of the government chain of title, John A. Combs, mortgagee, and Elliott C. Davison, tax title purchaser for the taxes of the year 1899, upon sale made by the county treasurer May 23, 1893 [1903]. Tax notices were returned personally served on such persons at the instance of Anderson, and were filed in the office of the county clerk of Chippewa county as follows: Notices served on Fitzhugh, McDonell, Bialy, Combs, and Davison, were filed June 29, 1904. Notice served on Hitchcock was filed August 17, 1904. Certified copies of these notices, with the returns of service, were duly recorded in the office of the register of deeds of said county on December 18,

Digitized by Google

1913. Joseph R. Hitchcock died some time prior to the alleged service of the tax notice on him. Archibald McDonell died after the service of the tax notice, but prior to the filing of the bill of complaint herein. On April 5, 1911, complainant placed in the hands of the sheriffs of Wayne and Bay counties, respectively, for service, tax notices directed to Herbert C. Hitchcock and Roxanna G. Hitchcock, sole heir and widow, respectively, of Joseph R. Hitchcock. Personal service was made on Mrs. Hitchcock April 7, 1911, and on Herbert C. Hitchcock April 11, 1911. Certified copies of these notices, with the returns, as filed with the county clerk April 21, 1911, were recorded in the office of the register of deeds on December 18, 1913. In 1908 defendants Closser, Davison, and Shupert obtained quitclaim deeds of the premises from Fitzhugh and Bialy, and on May 7, 1909, from Herbert C. Hitchcock. In 1910 and 1911 defendant Closser obtained quitclaim deeds from five of the McDonell heirs, and on May 4, 1911, from Roxanna G. Hitchcock. The latter deed was recorded September 4, 1912. The others were all recorded April 10, 1911, the day the bill of complaint was filed herein. On April 5, 1911, when the notices from Bretz to Roxanna G. and Herbert C. Hitchcock were received by the respective sheriffs for service, the defendants Closser, Davison, and Shupert had no interest of record in the premises. The record title was unchanged from the time of the service of the notices by Anderson until April 10, 1911.

"The bill of complaint alleges, in addition to setting up the regular chain of title, that Dayton W. Closser claims an interest in the land by reason of the purchase of the interests of certain of the parties of record, the amount of such interest, and the parties in interest from whom purchased being unknown to complainant. Bialy, Fitzhugh, Roxanna G. and Herbert C. Hitchcock, seven heirs and widow of Archibald McDonell, and Dayton W. Closser were originally made defendants in the bill. By amendments, Robert A. Davison, Harry L. Shupert, John A. Combs, and William E. Davison, administrator of the estate of Elliott C. Davison, deceased, are also made parties defendant. Because of the recording of the deeds before mentioned, the action was discontinued as to Bialy, Fitz-

Digitized by Google

hugh, Herbert C. Hitchcock, and five of the McDonell heirs. The parties defendant remaining are William E. Davison, as administrator of the estate of Elliott C. Davison, John A. Combs, Annie F. McDonell, widow, and Frank McDonell and Henry McDonell, heirs of Archibald McDonell, deceased, all of whom have defaulted, and against whom the bill has been taken as confessed, and Roxanna G. Hitchcock, Robert A. Davison, Dayton W. Closser, and Harry L. Shupert. Roxanna G. Hitchcock filed an answer and cross-bill on May 20, 1911, which was subsequent to her deed to defendant Closser. The three defendants, Closser, Davison, and Shupert, filed a joint answer and cross-bill. In their cross-bill they set up the service of the notices on Roxanna G. Hitchcock and Herbert C. Hitchcock, ask an accounting for the timber it is claimed complainant removed from the premises, and also ask the privilege of redeeming the premises from the tax title. Complainant answered the cross-bills, denying the right of defendants to redeem.

"The cause was submitted on briefs. At the hearing, innumerable objections, specific, general, and inclusive, were made by counsel to the introduction of practically all the testimony offered. This court cannot be expected to dive into the sea of adverse contention as to the admission of testimony, bring up all the shells of objections which may be strewn on the bottom, and discover for itself which contain pearls of merit. All the objections will not, therefore, be considered; but it will be assumed that such as were not deemed of sufficient importance by counsel to be noticed in the briefs are not insisted upon.

"In the tax notices were included the taxes of other years than those covered by Anderson's deed. Complainant introduced in evidence the decrees and tax records covering only those years mentioned in the deed, and offered no proof as to the other years mentioned in the notice. No case or statute is cited indicating that the amount stated in the notice is *prima facie* correct, and it is evident the court cannot take judicial notice of the years or the amounts of the taxes required to be paid as a condition of purchase. The burden of proof is upon the complainant to show a valid title and the service of a proper notice. The

Digitized by Google

proof offered was insufficient as to the taxes not included in the deed. *Backus* v. *Cowley*, 162 Mich. 585 [127 N. W. 775]. It appearing that no redemption had been made, the complainant, however, did make out a *prima facie* case by the introduction of the record of the certified copies of the tax notices served by Anderson on the parties in interest. Act No. 142, Pub. Acts 1905; *Vincent* v. *Evans*, 165 Mich. 696 [127 N. W. 760].

"The *prima facie* case was effectually rebutted by proof of the death of Joseph R. Hitchcock prior to the time of the alleged service of the notice on him. The period of redemption had not expired on the notices served on Herbert C. Hitchcock and Roxanna G. Hitchcock at the time of the filing of the bill of complaint. Consequently the complainant was not, at that time, entitled to the relief prayed for. No supplemental bill was filed setting up the service of the last-named notices. Nowhere in his pleadings does the complainant rely upon these notices as entitling him to affirmative relief. Under the pleadings they are pertinent only as affecting the right of defendants to relief. They cannot, therefore, be made the basis of a decree for complainant. *Moran* v. *Palmer*, 13 Mich. 367. The notices to Roxanna G. Hitchcock and Herbert C. Hitchcock were again introduced by complainant under his answer to defendants' cross-bill. They are set up in the cross-bill, and are counted upon as giving the right to redeem.

"It is evident that, because of the failure of service as to the interest held by Joseph R. Hitchcock, the defendants had the right to redeem the premises from the tax purchase at the time his action was begun. But by reason of the service of the notice on the widow and heir of said Hitchcock, the error in service on him was cured, and the period of redemption began to run from the time of filing the returns of service; *i. e.*, April 21, 1911. This right of redemption could have been protected and conserved to defendants by the proper deposit of the amount necessary to redeem. Neglecting to do this, they have lost such right, and this court, now that the period provided by statute has expired, cannot afford them any relief. The commencement of suit does not stop the running of the

Digitized by Google

statute of redemption, nor operate to extend the time. *Clothier* v. *Miller*, 173 Mich. 530, 537 [139 N. W. 253]. The right to an accounting for the timber removed must necessarily depend upon the right to redeem.

"The bill of complaint and the cross-bills will therefore be dismissed. No costs will be awarded to either party."

The learned circuit judge was undoubtedly correct in holding that the complainant was not entitled to relief upon his bill as filed. The bill was filed April 10, 1911. The right to relief was predicated upon the assumption that a proper notice of reconveyance was served upon Joseph R. Hitchcock on the 15th day of August, 1904. As a matter of fact Joseph R. Hitchcock died prior to the time of the alleged service upon him. The service upon Herbert C. Hitchcock and Roxanna G. Hitchcock, his sole heir and widow, was not made until April 7, 1911, and April 11, 1911, respectively, and return thereof was not filed until April 21, 1911. It is obvious that this service was not sufficient to clothe the court with jurisdiction to grant complainant relief under a bill filed April 10, 1911. The answer and cross-bill of the defendants was filed May 8, 1911. Defendants therein aver:

"(1) These defendants allege: That Roxanna G. Hitchcock, the widow of Joseph R. Hitchcock, is the owner of a redeemable interest in said land, and that complainant has served a tax notice upon her, wherein he offers to let her redeem upon payment of the sum of $189.44, and the fees of the sheriff. That return showing service of such notice upon Roxanna G. Hitchcock, and also return showing service of the like notice upon Herbert C. Hitchcock, was filed with the register of this court on or about the 21st of April, 1911.

"(2) These defendants allege that the right to redeem the land described in said bill of complaint has not been extinguished by full and complete compliance with the provisions of Act 229, Public Acts of 1897, and amendments thereto.

Digitized by Google

"(3) These defendants further allege that complainant's grantor, John D. Anderson, and also the said complainant, unlawfully cut and removed valuable timber from said land, and that in so doing they were trespassers and that the value of the timber so cut and removed exceeds many times the amount which defendants would be required to pay complainant if he were the holder of valid tax titles as in said bill of complaint alleged.

"(4) These defendants further allege that they are the owners of the timber and forest products which have been unlawfully removed from the said land, together with all rights of action for the recovery of the same, or the value thereof, or damages therefor, which formerly belonged to their grantors; they having acquired same by appropriate conveyances, which they beg leave to produce on the hearing hereof and make a part of this paragraph.

"(5) These defendants further allege that, by reason of the unlawful cutting and removing of the timber aforesaid, the said complainant and his grantors are estopped from claiming any right, title, or interest in and to said land by virtue of said tax deeds, and from claiming the right to any redemption money, and complainant ought to be required to account for the timber so cut and removed from said land by him, and the tax titles, if any there be, which he may have against said land, ought to be set aside and held for naught, for the reason that the said complainant has already secured more value from the said land than would be required to redeem from the said tax titles, and by so doing has depreciated the said value of the land, to the great damage of these defendants."

The decree must be affirmed, for the reason that the cross-complainants, at the time their cross-bill was filed, had no right to an accounting with the tax-title trespasser. They did not have this right because, though the time limited by the statute for redemption had not expired, they had in fact not redeemed, and were therefore not entitled to secure a reconveyance. As was said by Mr. Justice GRANT in *Griffin* v. *Ken-*

Digitized by Google

nedy, 148 Mich. 583, at page 591 (112 N. W. 756, at page 759):

"The law confers upon the negligent owner, not any title or right, but a privilege to obtain a reconveyance upon specified terms."

See, also, *Huron Land Co.* v. *Manufacturing Co.*, 183 Mich. 45 (148 N. W. 753), and cases there cited.

The decree is affirmed, without costs to either party.

KUHN, STONE, OSTRANDER, BIRD, MOORE, and STEERE, JJ., concurred.

The late Justice MCALVAY took no part in this decision.

In re HAMILTON.

1. CRIMINAL LAW—COMMITMENT—LIFE TERM—STATUTES — JUDGMENT—INDETERMINATE SENTENCE.

Under a sentence that the accused be confined in prison for a period of not less than ten years, the court recommending imprisonment for life, the order should be construed as fixing a maximum term of ten years, and the minimum be held to be fixed by statute at five years, the court clearly intending that his sentence should not be conclusive on the governor or pardon board: hence the accused was not entitled to his discharge because of the irregularity of the sentence or commitment. Act No. 184, Pub. Acts 1905, § 3.

2. SAME—INDETERMINATE SENTENCE.

As it is impossible to fix a minimum sentence, in the case of life imprisonment, that would equal one-half of the maximum term, there can be no minimum sentence as to life prisoners, to comply with the proviso in section 3 of the statute.

Digitized by Google

Habeas corpus by George E. Hamilton to determine the validity of a sentence and imprisonment imposed on the petitioner. Submitted June 26, 1915. (Calendar No. 26,765.) Decided October 29, 1915.

Edwin H. Lyon, for petitioner.

Grant Fellows, Attorney General, and *Samuel D. Pepper*, Assistant Attorney General, for respondent.

OSTRANDER, J. Petitioner is imprisoned. He can be held by the warden only by virtue of a lawful commitment. There was a commitment, and it appears to be agreed that it follows the judgment pronounced by the court. The judgment is:

"That the said George E. Hamilton be confined in the State House of Correction and Branch of the State Prison in the Upper Peninsula, Marquette, Mich., at hard labor, for a period of not less than ten years from and including this day, and the judge thereupon did recommend and state that, in his judgment, the proper maximum penalty would be the term of his natural life as fixed by the statute."

This was November 25, 1908.

The statute punishment of the crime for committing which petitioner was convicted is life or any number of years. In a consideration of all of the provisions of the statutes, including the indeterminate sentence law, we held in *People* v. *Vitali*, 156 Mich. 370 (120 N. W. 1003), that a judgment that the respondent be imprisoned for life was good; the statute punishment in that case, as in this, being life or any term of years, in the discretion of the court. The question presented in *Vitali's Case* was whether the judgment was bad in view of the provisions of the indeterminate sentence law; it being contended that a life sentence could not be imposed, but only a sentence for a term of years.

We said that the proviso to section 3 of the indeterminate sentence law should be construed as if it read:

Digitized by Google

"Provided, that in all cases where the maximum sentence in the discretion of the court may be life or any number of years, the court having in its discretion imposed a sentence for a term of years shall fix both the maximum and minimum sentences."

We said, also, and were obliged to say, to support the judgment, that "there could be no minimum sentence in case the life sentence were given," because the proviso which was in question there and here is that:

"In all cases where the maximum sentence, in the discretion of the court, may be for life or any number of years, the court imposing sentence shall fix both the minimum and maximum sentences. The minimum term of imprisonment thus fixed by the court shall not exceed one-half of the maximum term so fixed."

It is obvious that no minimum term of imprisonment can be fixed which shall be one-half of a life term, and that therefore "there could be no minimum sentence in case the life sentence were given."

In *People* v. *Dumas*, 161 Mich. 45 (125 N. W. 766), the sentence was for life, and, following *People* v. *Vitali*, it was held a good judgment. It is therefore manifest that, if in the case at bar the sentence had been for the life of petitioner, it would have been a good sentence in law, and we are confronted with the question: Was it the judgment of the court, as shown by its record, that petitioner be imprisoned for life? To this question I think but one reasonable answer can be given. We cannot hold the recommendation of the court as the sentence, and ignore the positive language of the judgment fixing a period of imprisonment of not less than ten years. I think it is plain that the court intended to give, and attempted to give, a judgment which would permit the operation upon the judgment of the indeterminate sentence law—a judgment which would permit the paroling or dis-

Digitized by Google

charge of petitioner at any period after ten years. This court cannot impose a proper sentence nor amend or modify the sentence which was imposed. It can only determine whether petitioner is now lawfully imprisoned, in view of the judgment and commitment.

In *Re Richards,* 150 Mich. 421 (114 N. W. 348), respondent had been convicted of an offense for which the punishment fixed was like the one fixed in the case at bar. The judgment was that he be committed for a term of not less than six years, "and the court recommended that the maximum term be not more than seven years." Later a new judgment was entered which, following the statute, imposed a term of imprisonment of not less than six years, with a maximum of twelve years. Plainly, the trial judge intended to impose not a life sentence in any event, but a term of years. We held the second judgment unwarranted, but refused to discharge because the commitment followed the second judgment, holding that the first sentence could be sustained, and a new commitment in conformity therewith could be issued. We said:

"The prisoner was entitled to have the decision of the judge upon the maximum, and a minimum fixed which should not exceed half of it, not a minimum fixed, and a maximum which should not be less than double the minimum. Such is the language of the statute. Act No. 184, Pub. Acts 1905, § 3. Section 2 provides that the minimum shall not exceed one-half of the maximum penalty prescribed by law, while section 3 prohibits an excess over one-half of the maximum fixed—*i. e.*, prescribed by the court. By this construction we preserve the harmony between the two provisions, between which there is an evident analogy. The court did determine the maximum penalty, and while we may well believe (especially in view of his subsequent change of sentence) that he did it believing that it was not conclusive upon the governor or pardon board, it must be governed by the same rule that would apply had the maximum fixed been double the minimum."

Digitized by Google

In sustaining the first judgment we held the recommendation of a maximum of seven years equivalent to the fixing of a term of seven years; we supplied, or the statute supplied, the minimum of three and one-half years. But we were dealing not with a case in which a life sentence was intended, or in any manner indicated, by the judgment.

In the case at bar the only sentence is one for ten years. It is the maximum and the minimum term fixed by the judgment. It was plainly not intended by the trial judge that the sentence should be conclusive upon the governor or pardon board. I am of opinion, therefore, that the judgment and commitment may be sustained as imposing a maximum sentence of ten years; the statute supplying the minimum of five years. In this view of the matter the prisoner must be remanded. Consult the earlier forms of the statute and the reasoning in *Re Cummins,* 138 Mich. 39 (100 N. W. 1008), and *In re Campbell,* 138 Mich. 597 (101 N. W. 826).

BROOKE, C. J., and KUHN, STONE, BIRD, MOORE, and STEERE, JJ., concurred.

The late Justice MCALVAY took no part in this decision.

Digitized by Google

BERNARD *v.* MICHIGAN UNITED TRACTION CO.

MASTER AND SERVANT—WORKMEN'S COMPENSATION—NOTICE.

Until notice of the intention of any employer to take advantage of the workmen's compensation act has been filed with, and accepted by, the Accident Board (Act No. 10, Extra Session 1912), an employer is not brought within its protection; notwithstanding that the servant injured may have made declarations or accepted compensation as fixed by the statute.

Certiorari to Jackson; Parkinson, J. Submitted June 9, 1915. (Docket No. 32.) Decided October 29, 1915.

Case by Charles N. Bernard against the Michigan United Traction Company for personal injuries. Judgment for plaintiff. Defendant brings error. Affirmed.

Price & Whiting, for plaintiff.

Sanford W. Ladd (*Warren, Cady, Ladd & Hill,* of counsel), for defendant.

MOORE, J. The questions involved in this proceeding are so clearly stated by the circuit judge in his direction to the jury that we quote freely from it as follows:

"The plaintiff in this suit, Mr. Bernard, has brought it claiming he is entitled to recover from the defendant company because of negligence causing personal injuries to him. The defendant has interposed a plea to the jurisdiction of this court. This denial of jurisdiction in this court to entertain this case is based on two claims practically, as I understand it: *First,* that regardless of anything the plaintiff did under the facts of this case, the plaintiff cannot maintain his suit in this court, but that his rights and his remedies are

Digitized by Google

under Act No. 10 of the Public Acts of the Special Session of 1912. *Second,* that the plaintiff, by signing Exhibit F, Exhibit M, and Exhibit N, and giving one to Mr. Kleinstiver, which was afterwards sent to the Industrial Accident Board at Lansing, has voluntarily placed himself under the provisions of that act, and is bound by his action as an irrevocable choice and must abide by it, and hence cannot now prosecute this suit.

"Act No. 10 of the Special Session of 1912 took effect from and after September 1, 1912. I believe the defendant company made its election to come under the provisions of that act September 7, 1912, but notice of such election was not received and filed by the Industrial Accident Board until September 9, 1912. That Industrial Accident Board did not approve of this election on the part of the company until November 20, 1912, and after that date the notices required by the act were posted by the railroad company.

"The accident to the plaintiff occurred on the 12th day of November, 1912, 8 days before the action of the board approving the election made by the railroad company. September 13, 1912, the board wrote the company for information as to its financial responsibility, and again on the same subject on November 7th, saying in the latter letter that the former one had not been replied to, and this board was withholding action because of defendant's delay.

"By section 1 of part 4 of this Act No. 10, employers had the right to choose one of four ways of paying in case of accident. The railroad company chose the first, that of paying direct to its injured employees. Such right so to specify was subject to the approval of the Industrial Accident Board. And to secure such approval the board requires satisfactory proof of the solvency and financial ability of the company. This it finally had, and on November 20th approved of the application and election of the company.

"The defendant in support of its plea to the jurisdiction says: *First,* irrespective of any act of plaintiff in recognition of Act No. 10 of 1912, he is subject to it and cannot maintain this suit; *second,* if not, then his positive action in signing Exhibit F, December 3, 1912, and delivering a duplicate to Mr. Kleinstiver, and which was sent to Lansing, was an adoption of the act of the legislature in question, and an election to

Digitized by Google

avail himself of it, from which he could not recede, or which he could not thereafter repudiate. These claims on the part of the defendant the plaintiff denies. These antagonistic claims require from this court a construction of this act of the legislature so far as is necessary to determine the questions at issue.

"Section 1 of that act, in reference to suits for personal injuries, takes away three defenses that before existed, unless, as to railroad companies, they had before been taken away or modified by Act 104 of 1909.

"Section 3 of part 1 reads as follows: 'The provisions of section 1'—which you will remember I stated before, takes away certain defenses that before existed —'shall not apply to actions to recover damages for the death of, or for personal injuries sustained by, employees of any employer who has elected, with the approval of the Industrial Accident Board hereinafter created, to pay compensation in the manner and to the extent hereinafter provided.' In that section it says that section 1 shall not apply to those who elect to come under this act and whose election is approved; couples the two things, the employer who has elected and approval on the part of the Industrial Accident Board.

"Section 4 uses substantially the same language: 'Any employer who has elected, with the approval of the Industrial Accident Board hereinafter created, to pay compensation as hereinafter provided, shall not be subject to the provisions of section one.'

"I think, to exempt the employer from the liabilities or responsibilities imposed by section 1, it is necessary that the employer have elected and that there should have been the approval of the Industrial Accident Board. So I am inclined to think that the action of the employer—in this case, the railroad company—its rights, as well as obligations, are not completed until it has not only made its election, but that it has had the approval of the Industrial Accident Board. By those two sections, those things go together. The status of the company does not seem to be completed or fixed without the two concurring actions, the election on the part of the company and the approval of the Industrial Accident Board.

Digitized by Google

"Section 5 says: 'The following shall constitute employers subject to the provisions of this act.' I omit subdivision 1 which has no application. Subdivision 2 says: 'Every person, firm and private corporation, including any public service corporation,' and the defendant company is a public service corporation, 'who has any person in service under any contract of hire, express or implied, oral or written, and who, at or prior to the time of the accident to the employee for which compensation under this act may be claimed, shall, in the manner provided in the next section, have elected to become subject to the provisions of this act, and who shall not, prior to such accident, have effected a withdrawal of such election, in the manner provided in the next section.' Now, that section or division of section applies to employers and to persons who have met with an accident, and seems to convey the meaning that the election should have been had prior to the accident. The election in this case, if that is all there is of it, was prior to this accident as far as that is concerned, but that election had not been approved; it had not become effective at the time of the accident. And I am inclined to think that the meaning of that subdivision 2 refers to the election made prior to the accident and the election that has become complete and in force by the approval of the Industrial Accident Board.

"Section 6 of part 1 provides, first, as to the way in which the election shall be made out, and says that in making it out the employer shall accept the provisions of this act, and that he adopts subject to the approval of said board one of the four methods provided. So that act is subject to the approval of the Industrial Accident Board. And it reads: 'The filing of such statement and the approval of said board shall operate, within the meaning of the preceding section, to subject such employer to the provisions of this act and all acts amendatory thereof.'

"For the moment I stop there. But it is the filing of the statement and the approval of the Industrial Accident Board that subjects the employer to the provisions of the act, and it seems to require the concurrence of those two things to complete the subjection of the employer to the provisions of the act. There is

Digitized by Google

a proviso in this connection: 'Provided, however, that such employer so electing to become subject to the provisions of this act shall, within ten days after the approval by said board of his election, filed as aforesaid, post in a conspicuous place in his plant, shop, mine or place of work, or if such employer be a transportation company, at its several stations and docks, notice in the form as prescribed and furnished by the Industrial Accident Board to the effect that he accepts and will be bound by the provisions of this act.' It seems to be plainly a part of the scheme and plan of this act that there shall be notice within 10 days after the election is approved, so that employees of the company, who are the other parties interested, shall have knowledge that their employer has elected to come under this law, and therefore that thereafter their remedies if they are hurt will be afforded under this law if they subject themselves to it. And I think it is a part of the scheme of the law they may exercise choice whether they will avail themselves of the rights this law affords or remain subject to the other laws governing the situation.

"While by the provisions of the section it is the filing of the statement and the approval of the board that operates to place the employer under the act, the proviso says such employer so electing to become subject to the provisions of this act within 10 days after approval shall give notice. Now that seems very plain that they are not to give notice to their employees until after their election has been approved, and I do not find anywhere in the scheme of this act anything to indicate that the employees ought to find out what the employer is doing until the thing he is doing has become fixed and completed, when the duty then rests upon the employer to give them notice in the manner specified.

"The sections preceding section 7 relate, for the most part, to the employer. Sections 7 and 8, being the remainder of part 1, relate mainly to the employee. Section 8 reads as follows:

" 'Any employee as defined in subdivision one of the preceding section shall be subject to the provisions of this act and of any act amendatory thereof. Any employee as defined in subdivision two of the preceding

Digitized by Google

section shall be deemed to have accepted and shall be subject to the provisions of this act and of any act amendatory thereof if, at the time of the accident upon which liability is claimed:

"'1. The employer charged with such liability is subject to the provisions of this act, whether the employee has actual notice thereof or not; and

"'2. Such employee shall not, at the time of entering into his contract of hire, express or implied, with such employer, have given to his employer notice in writing that he elects not to be subject to the provisions of this act; or, in the event that such contract of hire was made before such employer became subject to the provisions of this act, such employee shall have given to his employer notice in writing that he elects not to be subject to such provisions, or without giving either of such notices shall have remained in the service of such employer for thirty days after the employer has filed with said board an election to be subject to the terms of this act.'

"That is sufficient for this purpose. Section 8, in its first paragraph, uses the language, 'if at the time of the accident upon which liability is claimed,' the employer is subject to the act and the employee is subject to the act, to make it short. The employee becomes subject to the act if he is employed after the time that the master or employer has elected to come under the act and has not given notice in writing that he elects not to be subject to it, but if the employee is already in the employer's service when the employer comes under the act, then if he remains for 30 days and does nothing, he shall be presumed to choose to be under the act. This language is, 'thirty days after the employer has filed the election.' They filed this election on the 9th of September, and this accident was on the 12th of November, and more than 30 days elapsed between the filing by the employer and the accident, but the board did not approve of this act of the company until 8 days after the accident.

"It is insisted here that the 30 days began to run from the filing with the Industrial Board, which was on September 9th. Yet, until after the Industrial Board acts there is no provision for any notice to the employee whatsoever, so they have got to act within

Digitized by Google

30 days, if that rule is correct, as to something of which they have no notice or knowledge whatever, unless they get it by accident, or unless the employee is bound to watch the offices up at Lansing to find out what his employer is doing with reference to this act. That renders, so far as this situation is concerned, practically useless all provisions about giving notice. As to the act of filing the application or election with the Industrial Accident Board, there is no provision for any notice. I do not see the way the employees could get notice until the employer is actually under the law, but it is claimed, if I may say so at this point, that as applied to this case when the application is filed with the board on September 9th, and is approved November 20th, then it relates back—the completion of so being under the act relates back to September 9th, and puts everything under the act from September 9th. And if that is so, the employees come under the act without knowing it or having any chance to give written notice that they do not want to come in under the act. * * * But it seems to me an essential part of the scheme of the act that the employee have the right of choice. This implies, first, actual or constructive notice of the employer's election and actual submission to the law, and then the right on the part of the employee to choose by giving written notice or abstaining from it. Robbed of this opportunity, he is practically deprived of the right; and, if this is the real meaning of the statute, it is oppressive, an invasion and deprivation of individual right, and hardly to be tolerated or enforced. If I must so construe it, I am certainly reluctant to pronounce it valid as to those provisions. My inclination is to harmonize as far as possible every part with the general purpose of the act and without violating what seems to be the plain rights of the employees.

"Now the only question that confronts me, and as to which I feel some difficulty, is whether I ought to leave it to the jury to say and express by its verdict its judgment as to what took place between the company and this man while he was at the hospital. He signed the papers here (Exhibit F, Exhibit M, and Exhibit N) that have been shown in evidence, making application for his pay under this act. It is claimed that he did not know what his legal rights were at that

Digitized by Google

time, and that he afterwards refused to go ahead and consummate that arrangement after he had been informed in respect to his rights. It is claimed the company went on and made some payments in reliance upon his election to come under this act, and payments that under the law the company would not have been required to make. * * * This was not any act on the part of the plaintiff in trying to repudiate or annul anything he did before the accident. His relation to the employer was what it was; and, so far as this suit is concerned, he had rights or did not have rights at the very time of the accident. I mean so far as the law itself and its operation are concerned. If he was not, under all the circumstances, subject to this act, has he put himself in a position by what he did at the hospital on December 3d, and his delay in notifying to the contrary so that he cannot recede from it? Has he become bound to abide by the remedies of this statute, and are they as to him his exclusive remedies? With some misgivings I have concluded to hold that he has not placed himself in such a position, and that, if he was not under this law by virtue of its own operation, in view of what the employer has done, he was at the time of the commencement of this suit free to resort to the remedy which he did invoke by launching this proceeding."

The appellant argues here, as it did below, that the jurisdiction of the Jackson circuit court is barred in this action by the employers' liability and workmen's compensation act (Act No. 10, Pub. Acts 1912), and quotes freely from the act, and cites cases in support of its contention. We have examined these cases with care, and are not satisfied they are controlling. The question of notice has had the attention of this court in the recent case of *Mackin* v. *Axle Co.*, 187 Mich. 8 (153 N. W. 49), where we reached a different view upon the question of notice from that entertained by the circuit judge. It is not necessary to repeat what was there stated. The case in some of its aspects is one of first impression in this State. The statute works a radical change in the legal relations between em-

Digitized by Google

ployer and employed. It ought to be so construed that each of them may know when the new status is created. In the construction given the statute by the circuit judge as to the necessity of approval by the Accident Board this is done, and we are satisfied with that construction.

The remaining question is, Did the court err in not submitting to the jury the question of whether by his acts subsequent to the accident plaintiff brought himself within the act? We are satisfied that if a new status was created between these parties, it must be by virtue of the terms of the statute. If defendant has paid out sums of money relying upon the acts of the plaintiff, this can be taken care of in a new trial upon the merits.

Judgment of the court below is affirmed.

BROOKE, C. J., and KUHN, STONE, OSTRANDER, BIRD, and STEERE, JJ., concurred.

The late Justice MCALVAY took no part in this decision.

SMITH *v.* HAIGHT.

1. USE AND OCCUPATION— LANDLORD AND TENANT—BANKRUPTCY—CONTRACTS—STATUTES.

In an action for use and occupation against the grantee of a trustee in bankruptcy, where the trustee and his grantee refused to recognize plaintiff's title, claiming fraud in the conveyance to plaintiff by the bankrupt, also refusing to recognize an oral lease of the premises by plaintiff to the

Digitized by Google

bankrupt, and also claiming hostile possession of the trustee by reason of the amendment to the bankruptcy act of June 25, 1910 (30 U. S. Stat. chap. 541, § 47, 36 U. S. Stat. chap. 412, § 8), providing that the trustees, as to all the property coming into the custody of the bankruptcy court, shall be deemed vested with all the rights and remedies of a lien creditor, and as to all other property, not in the custody of the bankruptcy court, with all the rights and remedies of a judgment creditor holding an execution duly returned unsatisfied, no contract relations existed between plaintiff and defendant from which the relation of landlord and tenant could be implied, and that, notwithstanding a decision in an equity suit to set aside the conveyance sustaining its bona fides in favor of plaintiff as defendant.

2. SAME—ACTION—CONTRACT—REMEDIES.

An action for use and occupation, being founded on contract, express or implied, will not lie where the occupancy is adverse, the owner's title being in dispute; and a trespasser cannot be made liable for rent, as upon an implied contract to pay, by the landlord's notifying him that he would be expected, if he stayed, to pay rent.[1]

3. SAME—ASSUMPSIT—TORT—TRESPASS—REMEDY—PLEADING.

Where plaintiff's declaration was based upon the common counts, no attempt being made to waive the tort as provided in the statute (section 11207, 3 Comp. Laws), he cannot recover under his pleading; his remedy being an action of trespass or tort.

Error to Muskegon; Sullivan, J. Submitted June 16, 1915. (Docket No. 50.) Decided October 29, 1915.

Assumpsit by Frank M. Smith against Louis P. Haight for use and occupation. Judgment for plaintiff on a directed verdict. Defendant brings error. Reversed.

William Carpenter, for appellant.

Hilding & Hilding and *Charles A. Watt*, for appellee.

STONE, J. This case is here upon writ of error to the circuit court for the county of Muskegon, wherein

[1] As to when action for use and occupation of premises will lie, see notes in 14 L. R. A. 156, 26 L. R. A. 802.

Digitized by Google

a judgment was rendered for the plaintiff in the sum of $3,175 and costs. The case involves some of the facts that were involved in the equity case of *Haight* v. *Smith*, 178 Mich. 392 (144 N. W. 830). The instant case is in assumpsit for use and occupation of certain premises bought by the plaintiff from the Ross Manufacturing Company, a Michigan corporation, on January 7, 1911. On the 2d day of February following the said corporation was declared a bankrupt on its own petition. It was at that time a tenant of the plaintiff of the premises, at a rental of $100 a month. After the adjudication the premises were in the possession of a caretaker for a time. Later a trustee in bankruptcy was appointed, who took possession of the bankrupt's property. At the time he took possession, the trustee supposed that the premises in question belonged to the bankrupt's estate, and he took possession of them. He discovered afterwards, by an examination of the books of the corporation, that the premises had been conveyed to the plaintiff by deed. The trustee never believed that said conveyance to the plaintiff was a valid one, and he denied all rights of the plaintiff therein. On the 22d day of April, 1912, the trustee sold the greater part of the assets of the bankrupt estate to the defendant. Among the terms of the sale was an agreement by the defendant to indemnify and save harmless the trustee from the plaintiff's claim for rent of the premises. That agreement by the defendant was as follows:

"Now, therefore, in addition to the payment of $4,600 in cash as above stated, I do hereby assume the payment of all rents and royalties due from the said bankrupt estate, its receiver or trustee (from the time of the filing of the petition in bankruptcy up to the present time) to F. M. Smith of Allegan, Mich.; but reserve the right to contest all claims therefor, and to defend against them, the same as said bankrupt estate might."

Digitized by Google

In taking possession of the property which he had bought from the estate and which was situated on the premises in question, the defendant took possession of said premises, and continued in possession from April 22, 1911, until March 9, 1914. Prior to the sale from the trustee to the defendant, the plaintiff had sent a bill to the trustee for rent of the premises at $100 a month. Nothing was paid thereon by the trustee, and he denied the right of the plaintiff to either rent or any interest in the property. On December 8, 1911, the plaintiff, by his attorney, wrote to the defendant inclosing bills for rent of the premises in question, which he claimed, from June 7, 1911, to January 7, 1912, at $100 per month. The defendant did not answer this letter, but in the following month of January, 1912, he purchased from the trustee all of the estate's interest in its real estate, and all rights of action against the plaintiff, and filed a bill in equity to set aside the plaintiff's claimed title to the premises in question. *Haight* v. *Smith*, 178 Mich. 392 (144 N. W. 830).

In January, 1912, and before the bill to set aside plaintiff's title was filed, the plaintiff filed with the referee in bankruptcy a petition praying that the trustee be required and directed to pay rent for the premises involved. The trustee answered the petition in the following language:

"This trustee admits that the said Smith did present to him certain statements of account, whereby he claimed rent for said premises, but denies that this trustee ever rented said premises from him, or ever agreed to pay him for the occupation thereof, or ever had any contract relations with him, or ever admitted any liability of any kind for rent of said premises, or ever admitted that the amount claimed therefor was a reasonable charge, or that he is or ever was indebted to him therefor."

Digitized by Google

This court having decided, in *Haight* v. *Smith, supra,* on January 5, 1914, that the deed from the Ross Manufacturing Company to the plaintiff was valid, this action for use and occupation of the premises from April 22, 1911, to March 9, 1914 (at which time the premises were vacated by defendant), was brought in assumpsit, and at the trial a judgment was rendered on a verdict directed by the court upon the basis of $100 per month. There was evidence that a fair rental of the premises was $30 per month, but there was a conflict in the evidence upon that subject.

The substantial questions involved, and raised by the assignments of error, are:

(1) Did the relation of landlord and tenant exist between the plaintiff and defendant, so as to entitle the plaintiff to recover in an action of assumpsit for use and occupation?

(2) Was the defendant bound, under the circumstances, to pay to the plaintiff a rental of $100 per month by reason of the bills sent the defendant by plaintiff's attorney in December, 1911?

The first question was raised on the defendant's motion to instruct the jury to render a verdict in favor of the defendant, and the court's refusal to so instruct. Both questions are raised on the charge of the court. The appellant's position is well stated by his counsel as follows:

"Under the ruling of this court in the case of *Haight* v. *Smith,* 178 Mich. 392 (144 N. W. 830), the defendant concedes that the property, the use of which is involved in this case, is the property of the plaintiff. He also concedes that he occupied that property from April 22, 1911, to March 9, 1914, and that the plaintiff is entitled in a proper form of action to a reasonable compensation for the premises. It is his contention, however, that the relations of the parties were, from the outset, entirely adverse; that the rights of the plaintiff to the property, and to its possession, were disputed; that the relation of landlord and tenant never

Digitized by Google

existed between them, and that there were no contract relations from which that relation could be implied. The case, therefore, comes under repeated decisions in this State, that an action for use and occupation must rely only on a contract, express or implied, where the relations of landlord and tenant exists."

The following cases are cited in support of this position: *Dwight* v. *Cutler*, 3 Mich. 566 (64 Am. Dec. 105); *Hogsett* v. *Ellis*, 17 Mich. 351; *Marquette, etc., R. Co.* v. *Harlow*, 37 Mich. 554 (26 Am. Rep. 538); *Lockwood* v. *Boom Co.*, 42 Mich. 536 (4 N. W. 292); *Henderson* v. *City of Detroit*, 61 Mich. 378 (28 N. W. 133); *Ward* v. *Warner*, 8 Mich. 508.

As we understand the plaintiff, he does not claim that the defendant ever contracted with him for the use and occupation of the premises, but it is his claim that the manner in which the defendant came into possession, in itself, made him a tenant of the plaintiff. It appeared at the trial that the Ross Manufacturing Company had been in possession under an oral lease from the plaintiff. The trustee never recognized that lease and never claimed anything for it. It was not considered an asset of the estate, and was not sold. On the contrary, the trustee and the defendant claimed that the conveyance to the plaintiff was fraudulent and void as to creditors.

Our attention has been called to the amendment to the bankruptcy act of June 25, 1910 (36 U. S. Stat. 840), wherein it was provided that:

"The trustees, as to all property in the custody or coming into the custody of the bankruptcy court, shall be deemed vested with all the rights, remedies, and powers of a creditor holding a lien by legal or equitable proceedings thereon, and also, as to all property not in the custody of the bankruptcy court, shall be deemed vested with all the rights, remedies, and powers of a judgment creditor holding an execution duly returned unsatisfied."

Digitized by Google

It is the claim of the appellant that the trustee was therefore, by force of the bankruptcy law, hostile to the plaintiff, and whatever possession he took of the plaintiff's property he took under an adverse claim, and not under any lease to the corporation, and that possession of the defendant was the same as that taken by the trustee. We think that the conduct both of the trustee and of the defendant was consistent with this claim. The trial court in directing a verdict referred to the cases of *Thompson* v. *Sanborn*, 52 Mich. 141 (17 N. W. 730), and *Ducey Lumber Co.* v. *Lane*, 58 Mich. 520 (25 N. W. 568). A reference to those cases will show that in both of them the relation of landlord and tenant existed. In the last cited case the court said:

"The defendant asserted no adverse right to the use or occupancy of the dock, nor did he deny that plaintiff was entitled to compensation for such use."

It is elementary that an action for use and occupation, being founded on contract, express or implied, will not lie where the occupancy of the one sought to be charged has been tortious, he being a trespasser, or has been under an adverse claim, as where he has acquired, and maintained under a different or adverse title, or disputes the present owner's title; and a mere trespasser cannot be made liable for rent as upon an implied contract to pay, by proof that the landlord notified him that he would be expected, if he stayed, to pay rent at a specified rate, and rendered monthly bills therefor, which the occupant refused to pay. 39 Cyc. pp. 860-863, citing many cases, including *Gallagher* v. *Himelberger*, 57 Ind. 63, upon the last point.

We are of the opinion that the cases cited support the position of the defendant, and that they apply to the facts in this case. It follows that the plaintiff cannot recover under his declaration, but that his remedy is by an action of trespass or tort. Whether he

Digitized by Google

might waive the tort and recover in assumpsit has not been discussed by counsel, and the declaration being really upon the common counts, the statute (section 11207, 3 Comp. Laws) not being referred to or counted upon, nor the fact of the trespass or tort alleged in the declaration, the plaintiff is not entitled to recover upon this theory. *Weidman* v. *Willson,* 153 Mich. 82 (116 N. W. 539).

We are of opinion that the court erred in directing a verdict for the amount indicated, and the judgment of the circuit court is reversed, and a new trial granted.

BROOKE, C. J., and KUHN, OSTRANDER, BIRD, and STEERE, JJ., concurred. MOORE, J., did not sit.

This case was originally assigned to the late Justice MCALVAY.

ROGERS v. DAVISON.

1. TAXATION—DESCRIPTION—NOTICE TO REDEEM.
   Where complainant acquired title to land, which was assessed as one parcel, by the tax deed of 1892, and, in order to acquire such title, was required to pay taxes subsequently assessed on the premises as two parcels, it was unnecessary, in the notice to redeem, to state the separate amounts assessed to each parcel, as defendant would have to pay the total amount to redeem either parcel.

2. SAME—DESCRIPTION—NOTICE TO REDEEM—EXCESSIVE DEMAND—DEFECTIVE NOTICE.
   Complainant's demand, in the notice served on defendant, for $10.00, as for two descriptions, was excessive, where the statute allows $5.00 for each description; but the

Digitized by Google

notice was not thereby invalidated, as the "amount paid" in taxes, required by the statute, was correctly given.

3. SAME—NOTICE TO REDEEM—EASEMENTS.

Where the patentee of land sold part of the premises, reserving a roadway connecting the two parcels, and later sold the other parcel, the title to both becoming merged in one owner, the easement was extinguished, and the notice to redeem from a tax sale was not defective because not served upon the patentee.

Appeal from Alpena; Emerick, J. Submitted October 14, 1914. (Docket No. 94.) Decided October 29, 1915.

Bill by Austin L. Rogers against Robert A. Davison to remove a cloud from complainant's title, and to restrain an action at law. From a decree for plaintiff, defendant appeals. Affirmed.

O'Brien & Francis, for complainant.

D. W. Closser (*Joseph H. Cobb*, of counsel), for defendant.

BIRD, J. On December 5, 1904, complainant, Rogers, bought from the State the southeast ¼ of the northwest ¼ and the northeast ¼ of the southwest ¼ of section 10, township 29 north, range 6 east, for the delinquent taxes of 1892. At the same time he was required to and did buy the title of the State for the delinquent taxes of 1890, 1893, 1894, 1898, 1899, and 1900. He also purchased the State bids for the taxes of 1901, and he paid the taxes levied thereon for the years 1902 and 1903.

On the 16th day of February, 1906, complainant caused to be served upon defendant, Samuel A. Davison, the owner of the original title, the statutory notice to redeem. Davison did not redeem, but after the time had expired in which he could redeem he commenced an ejectment suit against the tenants of com-

Digitized by Google

plainant, whereupon complainant filed this bill to remove the cloud from his title, and, further, to restrain the proceedings at law to which he had not been made a party. Two questions are raised on appeal by the defendant:

(1) Was the notice to redeem defective?
(2) Was the notice served upon all of the parties in interest?

1. To support this contention two defects are pointed out:

(*a*) That the notice fails to give to each parcel of land described and assessed separately the amount paid for each description; (*b*) that two descriptions were charged for, whereas only one should have been demanded.

(*a*) It is said in *Jackson* v. *Mason*, 143 Mich. 355 (106 N. W. 1112), that:

"We have held that, where a notice was based upon several years' taxes, a notice giving the aggregate was proper. *Williams* v. *Olson*, 141 Mich. 580 (104 N. W. 1101); *Tucker* v. *Van Winkle*, 142 Mich. 210 (105 N. W. 607). This was for the reason that to repurchase, all taxes upon the description must be paid. Where, however, as in this case, there are various descriptions separately sold, the amount paid for each should be given in the notice, failing in which the notice is not a compliance with law."

Other holdings to the same effect are *Duncan Land, etc., Co.* v. *Rusch*, 145 Mich. 1 (108 N. W. 494); *Sanborn Co.* v. *Johnson*, 148 Mich. 405 (111 N. W. 1091); *Haden* v. *Closser*, 153 Mich. 182 (116 N. W. 1001); *McRae* v. *Barber*, 167 Mich. 314 (133 N. W. 12).

These cases are relied upon to show the defect claimed. The trial court held, in substance, that these cases were not in point, because the instant case presents a different situation. Attention is called to the fact that the premises were assessed and sold in 1892 as one parcel. Subsequent to that year the premises

Digitized by Google

were assessed as two parcels, because owned separately. Complainant acquired title thereto by the tax deed of 1892, and in order to acquire such title he was obliged to pay all other taxes which had become a lien thereon. In view of this the chancellor held that it was unnecessary to state in the notice the separate amounts assessed to each parcel, because the defendant was obliged to pay all those sums whether he redeemed the whole or only one parcel. This distinction seems to be well taken, and to be supported in *Loud* v. *O'Brien,* 167 Mich. 206 (132 N. W. 495).

(*b*) But if it is true that there was no necessity for the annual taxes to be apportioned to the two parcels, then we are of the opinion that only one description should have been charged for, and that the demand in the notice for $10 for two descriptions was an excessive demand.

The question then arises whether the excessive demand invalidates the notice. We held in *Teal Lake Mining Co.* v. *Olds,* 178 Mich. 335 (144 N. W. 845), that an excessive demand of the "amount paid" was fatal. The reason for so holding was because the form of the notice prescribed by the statute (Act No. 204, Pub. Acts 1899) makes it mandatory that the "amount paid" be stated. There is no claim here that there was an excessive demand of the "amount paid." The excessive demand arose out of the statutory permission to charge $5 for each description. The court is of the opinion that a distinction should be made between these demands. The form of the notice prescribed by the statute includes a demand for $5 for each description, but it does not require the aggregate amount for several descriptions to be stated. When this demand is made in the notice and followed by the descriptions, the person upon whom the notice is served can make the computation as well as the owner of the tax title. Presumably the legislature required the "amount paid"

Digitized by Google

to be stated in the notice, because of the difficulty of its ascertainment. Its failure to require the total amount claimed for descriptions to be stated was undoubtedly due to the fact that the person receiving the notice could gather the information from the face of the notice and make the computation himself, if he chose to do so. In the case before us, if the original owner believed that the demand for descriptions was excessive, he had the right to tender the amount for one description, and, had he done so, his redemption would have been effective. We are therefore of the opinion that, where there is a failure to state in the notice the aggregate amount claimed for descriptions, or where there is an excessive demand for descriptions, the notice should not by reason thereof be invalidated.

2. It is claimed by appellant that the notice to redeem should have been served upon Robert McLeod, who patented the land. McLeod erected his buildings on the north 40, and afterwards, when he sold the south 40, the following reservation was made in the deed:

"The party of the first part reserves the right of a road two rods wide from the northeast corner of the said parcel of land above described, and running south to Wolf creek."

Subsequently McLeod sold the north 40, and later the title thereto became vested in the owner of the south 40. The wording of this reservation would not justify us in construing it as an exception to the grant, but it undoubtedly did create an easement. *Bolio* v. *Marvin,* 130 Mich. 82 (89 N. W. 563). When the title to both forties became vested in the same grantee, the easement was extinguished by operation of law. This was the view of the chancellor, and we are in accord with it.

Digitized by Google

It follows from what has been said that the decree of the trial court must be affirmed.

BROOKE, C. J., and KUHN, STONE, OSTRANDER, MOORE, and STEERE, JJ., concurred.

The late Justice MCALVAY took no part in this decision.

PRICE *v.* TOWNSHIP BOARD OF OAKFIELD TOWNSHIP.

1. STATUTES—CONSTRUCTION—RETROACTIVE EFFECT.
   Legislation is to have prospective operation only, except when the contrary intent is clearly expressed.

2. INTOXICATING LIQUORS—APPROVAL OF LIQUOR BOND—TOWNSHIP BOARDS—DISCRETION—STATUTES.
   Respondent township board was not justified, under Act No. 169, Pub. Acts 1915, in exercising a discretion to reject relator's application and bond for a liquor license, said act having gone into effect subsequent to the filing of relator's application and bond; and it was the duty of said board to act fairly and in good faith, and not captiously, in the approval of bonds, and if the applicant had brought himself within the terms or conditions imposed by the statute, his application should have been granted and his bond approved.[1]

3. SAME—TOWNSHIP BOARDS—APPROVAL OF LIQUOR BOND—MANDAMUS.
   Relator had the right to demand from the township board action on his application and bond under the law as it stood when they were filed; and the captious refusal of respondent to perform its legal duty being unwarranted, mandamus will issue to compel same.

[1]The matter of discretion in granting of liquor licenses is discussed in notes in 21 L. R. A. 580, 18 L. R. A. (N. S.) 336.

Digitized by Google

Certiorari to Kent; McDonald, J. Submitted October 27, 1915. (Calendar No. 26,981.) Decided November 10, 1915.

Mandamus by Raymond A. Price against the township board of Oakfield township to compel respondent to approve the retail liquor bond of relator. An order was entered denying the writ. Respondent brings certiorari. Reversed, and remanded with directions that the writ issue.

Thompson & Temple, for relator.

Earl F. Phelps, for respondent.

BROOKE, C. J. Relator's petition to the circuit court for a writ of mandamus shows that he conducted a saloon, in the village of Harvard in the township of Oakfield, from the 1st day of May, 1913, to the 1st day of May, 1914; that on the 16th day of April, 1914, he presented his application to the board of said township, which was approved, and that on the 23d day of April, 1914, he presented to the said board a bond in accordance with the statute, and that on the 27th day of April, 1914, the said board refused to approve said bond; that he thereupon brought mandamus proceedings to compel the approval of said bond, in which proceeding he was successful, this court having affirmed the decision of the lower court. *Price* v. *Township Board of Oakfield,* 182 Mich. 216 (148 N. W. 438). The bond filed by relator was signed by a bonding company. The statute authorizing the acceptance of such bond provides that if a majority of the electors of a township, village, or city should petition the board thereof not to accept a surety company bond, it would be unlawful so to do; that upon serving the order of affirmance upon the said board, the board convened as therein ordered, whereupon a petition was filed,

Digitized by Google

under the statute as aforesaid, objecting to the approval by the said board of said bond, for the reason that it was signed by a bonding company; that, the board being brought before the circuit court for said county in contempt proceedings, the circuit court held that the filing of said petition was sufficient excuse for noncompliance with said writ of mandamus; that, being desirous to engage in the saloon business, the relator presented a proper application, and caused the same to be filed with the township clerk on the 28th day of July, 1915, to reopen and conduct the said business; that on the 31st day of July, the said township board was duly convened, and refused to approve the said application by a vote of 3 to 1, upon the ground that the date for filing the application was past, said application not having been filed before the 1st day of May; that on the 7th day of August, 1915, relator applied to the circuit court for a writ of mandamus requiring said board to reconvene and approve his said application; that on the 23d day of August, 1915, the circuit court issued a writ of mandamus to said township board to reconvene and approve the said application so presented; that on the 26th day of August, 1915, the said township board convened in obedience to said writ and approved the said application; that thereupon a bond was presented in accordance with the statute, to said board for its approval, which was rejected by a vote of 3 to 1. Relator further shows that members of said board have declared that they would do all they could to delay proceedings relative to the approval of said bond for the conducting of a saloon in said township; further, that the board arbitrarily and wilfully failed to approve of said bond, and that the action is unjust and illegal, and deprives relator of his lawful rights in the premises. Relator prayed for a writ of mandamus, requiring said board to approve said bond. Attached

Digitized by Google

to his petition to the circuit court was a copy of the bond, which appears to comply with the statute in form and substance, and upon which two individuals qualified as sureties in the penal sum of $6,000. An order to show cause having been issued by the circuit court, an answer was filed on the 1st day of September, 1915, which sets out:

"That the laws of the State of Michigan make it discretionary on the part of township boards to approve of or reject all retail liquor applications and bonds, and that said law was in force and effect on the 26th day of August, 1915, as your respondent is advised and believes, and that, exercising its option as it had a right to do, as it is informed and believes, refused to approve of the bond of Raymond A. Price, relator."

On the 7th day of September the board filed an amended answer, setting out the following facts:

"That on the 24th day of August, 1915, there was served upon this board a writ of mandamus, issued out of and under the seal of this court, requiring this township board to convene and approve of the application of Raymond A. Price, and, said writ of mandamus being mandatory in form, this respondent understood that it was necessary for it to comply with said order, or be in contempt of court, and this respondent further understood that the new law, namely, Act 104 (169) of the Session Laws of 1915, made a discretion therein with the township board as to whether they should approve of a retail liquor bond, and, believing that the township board were required by said writ of mandamus to approve of said application, said board did approve of said application on the 26th day of August, 1915, as will more fully appear from the copy of the resolution passed by the township board on said day, which copy is hereto attached and made a part hereof and marked 'Exhibit A.' That the members of said township board were present in open court when the above matter was heard on the 1st day of September, 1915, and heard the remarks of the circuit court judge, to the effect that he did not

Digitized by Google

intend to sign an order requiring the township board to reconvene and approve of said application, but that he intended to sign an order to reconvene and consider said application and approve of it if there were no legal reasons why they should not do so. Said board after hearing such remarks of the circuit court judge, and after learning that the said circuit court judge did not intend, by his order of mandamus, to take away from said board the discretion vested in said board by Act 104 (169) of the Session Laws of 1915, reconvened on the 2d day of September, 1915, and rescinded their action approving of said application, as will more fully appear from the copy of said resolution passed by said board, hereto attached and made a part of this answer and marked 'Exhibit B.'

"When said board approved of said application they did so under a misapprehension of their rights, they believing that said Act 104 (169) gave them a discretion as to approving of an application for retail liquor license, and said board believed that said order of mandamus, requiring said board to approve of said application, must be complied with at all hazards, and said board further believed that when said application had been approved and a bond was presented by said applicant, that the said board would have a discretion, under said Act 104 (169), as to approving of said bond, that said action approving of said application on the 26th day of August was under a mistaken understanding on the part of said board as to their rights in the matter, and when said board was informed as to said Act 104 (169) and the intention of said circuit court judge in issuing said mandamus, said board promptly reconvened on the 2d day of September, 1915, and rescinded said action of approving said application. Respondent, therefore, says that the writ of mandamus made in this action should not issue because Act 104 (169) of the Public Acts of 1915 gives this respondent a discretion and option as to the approving or disapproving of the application and the bond, for a retail liquor license, and submits that the prayer in said petition should be denied.

"Dated September 7, 1915.

"Township Board of Oakfield Township.

"By WM. A. PETERSON."

Digitized by Google

EXHIBIT A.

"Whereas, a writ of mandamus has been issued by the circuit court of the county of Kent, State of Michigan, ordering the township board of Oakfield township in said county to convene and approve the application of Raymond A. Price for a retail liquor dealer's license: Therefore, be it resolved that we, the said board, do this day approve the said application.

"Dated Aug. 26, 1915.

"Township Board,
"WILLIAM A. PETERSON, Supervisor.
"A. J. REYNOLDS, Justice.
"ROY GRAY, Justice.
"L. J. GRISWOLD, Clerk."

EXHIBIT B.

"At a session of the circuit court held in and for the county of Kent on the 1st day of September, 1915, said court stated that its order compelling the township board of Oakfield to convene and accept the application of Raymond A. Price for a saloon license was intended to have been an alternative writ. Therefore be it resolved that we rescind our action in accepting said application.

"WM. A. PETERSON.
"A. J. REYNOLDS.
"ROY GRAY."

On September 8, 1915, the circuit court denied relator's application for a writ of mandamus, whereupon relator secured from this court a writ of certiorari to review such action.

Counsel for appellant in their brief state that three propositions are raised, as follows:

"(1) Is Act 169 retroactive, so that it will apply to proceedings brought before the board before the act became operative?

"(2) The law compels a man to know it, and, so being informed, can the excuse set forth in its amended answer avail respondent?

"(3) Is Act 169 of the Public Acts of 1915 constitutional?"

Digitized by Google

Act No. 169 of the Public Acts of 1915 is an independent enactment, and is entitled:

"An act to authorize township boards to refuse to approve any and all applications for license presented to them for their approval by any person, firm or corporation proposing to engage in the business of selling or offering for sale spirituous or intoxicating liquors or mixed liquors and malt, brewed or fermented liquors by retail."

It was approved May 7, 1915. The 1915 legislature adjourned May 25, 1915. The Constitution (article 5, § 21) provides:

"No act shall take effect or be in force until the expiration of ninety days from the end of the session at which the same is passed."

It is therefore obvious that Act No. 169 did not become the law until August 24, 1915. Relator's application and bond were filed together upon the same day, as stated in brief for relator, upon July 28, 1915. On July 31, 1915, the board convened and rejected the application. At that time it is clear that Act No. 169 had not gone into effect. We have held on various occasions that legislation is to have prospective operation only, except when the contrary intent is clearly expressed. *Phillips* v. *Township of New Buffalo*, 68 Mich. 217 (35 N. W. 918); *In re Lambrecht*, 137 Mich. 450 (100 N. W. 606).

The duty of the township board in the premises, under the law as it stood at the time the application was made, was clearly pointed out by Mr. Justice STONE, speaking for the court, in *Price* v. *Township Board of Oakfield, supra*, where it is said:

"It is the duty of the board or council to act fairly and in good faith, and not captiously, in the approval of bonds. It is its duty to investigate the responsibility of the sureties; and, when it appears that this has been done and the investigating body is satisfied that

Digitized by Google

the proposed sureties are irresponsible for the amount of the bond, or that the bond is not in the statutory form, the same should be rejected."

Earlier in the opinion it is stated that if the applicant has brought himself within the terms or conditions imposed by the statute, his application should be granted and his bond approved. See, also, *Hanold* v. *Common Council of Stambaugh*, 163 Mich. 243 (128 N. W. 233).

It is apparent, from a perusal of the record, that the board in refusing to act upon relator's bond was of the opinion that, Act No. 169 having gone into effect subsequent to the filing of relator's application and bond, but before action on the bond was had, they were justified in exercising a discretion, under the act, in withholding their approval of said bond. It is, we think, manifest that upon the filing of the application and bond relator had the right to demand from the township board action thereon, under the law as it then stood, and that the captious refusal on the part of the township board to perform its legal duty in the premises, thus delaying action until Act No. 169 went into operation, was unwarranted.

Under this view of the case it is unnecessary to consider the other questions presented.

The order of the trial judge is therefore reversed, and the proceedings remanded, with directions that the writ of mandamus issue as prayed for.

PERSON, KUHN, STONE, OSTRANDER, BIRD, MOORE, and STEERE, JJ., concurred.

Digitized by Google

ALLEN *v.* ALLEN.

1. DIVORCE—DISMISSING BILL—EQUITY—DECREES AND ORDERS.
   Leave of the court must ordinarily be obtained to dismiss a proceeding in equity, and in divorce proceedings, particularly, in which the public frequently is concerned, the rule should not be relaxed.

2. SAME—CONSENT—ALIMONY—MOTION.
   From the fact that a motion for temporary alimony was denied it could not be implied that the court consented to the dismissal.

3. SAME—DOMICILE.
   Upon reviewing the testimony, the finding of the trial court that complainant had retained his domicile in Michigan, during his sojourn in Alaska, is affirmed.

4. SAME—COURTS.
   Where complainant filed a bill for divorce in Genesee county, to which defendant filed her cross-bill, and complainant later went to Alaska, and secured a decree of divorce there, the Genesee circuit court which first obtained jurisdiction retained the same and could enter a valid decree for defendant under her cross-bill.

5. SAME—EXTREME CRUELTY.
   And the complainant's failure to deny his wife's charges of extreme cruelty, although the court gave him an opportunity to take the stand and rebut her testimony, tended to corroborate her claims, though otherwise unsupported.

6. SAME—ALIMONY.
   An award of $3,000 alimony and $400 solicitor's fees, and $3.00 a week for the support of the infant until it should become 14 years of age, out of property worth $5,500 which defendant did not help to accumulate, *held* excessive and reduced to $1,000 permanent alimony, $200 solicitor's fees and $3 per week for the child until it should become 14 years old.

Appeal from Genesee; Wisner, J. Submitted October 16, 1914. (Docket No. 107.) Decided December 21, 1915.

Digitized by Google

Bill by Henry H. C. Allen against Blanche Allen for divorce. From a decree for defendant, on her cross-bill, complainant appeals. Modified.

Thomas A. Lawler (*John F. Berry*, of counsel), for complainant.

Roy E. Brownell, for defendant.

BIRD, J. Complainant was a resident of Flint in June, 1905, when he decided to seek his fortune in the Alaskan gold fields. On his way to Nome he stopped in Seattle, and while there married the defendant and took her with him. They lived together in Nome less than a year, when she left him, as she claims, on the ground of cruel treatment. A short time after they separated she gave birth to a child. About two years later he returned to Flint and instituted this proceeding in February, 1907, to obtain a decree of divorce. Service was obtained upon her by publication, and her default for want of appearance was duly entered. Subsequently her default was set aside by stipulation of the parties, and on August 8, 1907, her answer and cross-bill were filed praying for a decree of divorce upon the ground of extreme cruelty. The answer being called to complainant's attention, he claims that he learned for the first time that it would be necessary, in order to maintain his bill, to show that he had been a resident of Michigan for two years previous to the filing of his bill. In consequence of this, and in September, 1907, complainant's counsel filed a dismissal of the cause, but without leave of court. After doing so complainant returned to Nome and made application in the district court for a decree of divorce on the ground of extreme cruelty, which was duly granted in that court in October, 1908. Service was likewise had upon the defendant in that court by publication. After complainant returned to Nome defendant made a motion in this cause for temporary alimony and

Digitized by Google

solicitor's fees. Complainant's solicitor appeared and announced to the court that a dismissal had been filed, and the reason for so doing, and the application was denied. Some further motions and interlocutory orders were made, to which we think it will be unnecessary to refer. Matters continued to stand in this way until June, 1913, when the cause was noticed for hearing and placed upon the calendar against the protest of the complainant. The hearing was subsequently had in the October term of court. As a result of the hearing upon the merits the court held that it had jurisdiction of the cause, and it granted the defendant a divorce upon her cross-bill, and granted her permanent alimony in lieu of dower in the sum of $3,000, with an additional $400 for expenses and solicitor's fees, with a further provision that he pay $3 a week for the care and support of the child until he arrives at the age of 14 years. Subsequently a rehearing was asked for by complainant on jurisdictional grounds, but this was refused, and he has appealed to this court. The questions raised by complainant are:

(1) That the circuit court for Genesee county had no jurisdiction to render a decree in the premises, for the reason that the cause had been dismissed in 1907.

(2) That the court was without jurisdiction in the premises, for the reason that the complainant was not a resident of Genesee county for two years preceding the time of making his application for divorce.

(3) That the decree of divorce granted by the district court of Nome was a bar to the proceedings.

(4) That on the merits defendant was not entitled to a decree of divorce.

(5) That the alimony granted was excessive.

1. It is strenuously insisted by the complainant that the court had no jurisdiction in the premises, for the reason that the cause had been dismissed in 1907. It has generally been held in chancery proceedings that a complainant could not dismiss his case without the

Digitized by Google

aid of the court. 6 Enc. Pleading & Practice, p. 871; 7 Standard Enc. of Practice, 654; 14 Cyc. p. 395; 9 R. C. L. p. 197. And until the entry of judgment of dismissal the court has jurisdiction of the case. 9 R. C. L. p. 207; *Barnes* v. *Barnes*, 95 Cal. 171 (30 Pac. 298, 16 L. R. A. 660). The public may have an interest in divorce proceedings. *Coon* v. *Coon*, 163 Mich. 644 (129 N. W. 12). Therefore in such cases the rule should be strictly followed.

But it is argued that the denial of defendant's application for temporary alimony was a recognition by the trial court of the dismissal theretofore filed. No reason appears of record why the chancellor denied the motion, save what may be inferred from the order of denial. By reason of this we do not think the order of denial should be construed to be an implied consent by the court to the dismissal of the case. Our conclusion is that the steps taken by complainant to dismiss his case were not sufficient to divest the court of jurisdiction.

2. The question whether complainant abandoned his residence in Genesee county while he was in Nome was one which received no little attention upon the hearing. Considerable proof was received bearing thereon. Without setting it out in detail, we shall content ourselves by saying that the record contains evidence which justifies the finding of the chancellor that his stay in Nome was a mere temporary one, and that he retained his residence in Flint during the time, and we are not disposed to disturb that finding.

3. It is urged that the decree of the district court of Nome was a bar to these proceedings. Inasmuch as the trial court of Genesee county first obtained jurisdiction in the premises, under the well-established rule, it would retain jurisdiction to decide the issues. *Hudson* v. *Judge of Superior Court*, 42 Mich. 248 (3 N. W. 850, 913); *Maclean* v. *Circuit Judge*, 52 Mich.

Digitized by Google

257 (18 N. W. 396); *E. T. Barnum Wire, etc., Works* v. *Circuit Judge*, 59 Mich. 272 (26 N. W. 802, 805); *Bates* v. *Circuit Judge*, 82 Mich. 91 (46 N. W. 29).

4. The chancellor was of the opinion that defendant was entitled to a decree of divorce on the merits. We are inclined to agree with him in this conclusion. The charges of cruel treatment alleged and testified to by defendant were of a serious nature, and, while there was not much corroboration of her testimony, they were not denied by complainant at the hearing. His failure to take the stand and deny or explain the charges when given an opportunity to do so by the court is very persuasive that there was much truth in them.

5. While we do not feel disposed to disturb the conclusions of the chancellor in retaining jurisdiction and granting to defendant a decree of divorce, we are persuaded that the amount of alimony granted was excessive. The chancellor found the value of certain real property which had recently descended to complainant from his father to be $5,500, and we think the record fairly shows that complainant had nothing aside from this. The parties lived together less than a year, and the defendant did not help to earn any of this property. We think, under the circumstances, that an allowance of $1,000 as permanent alimony, and an allowance of $200 for solicitor's fees and expenses will be a fair allowance.

The amount of $3 per week allowed for the maintenance of the child until he is 14 years of age is probably about what it should be.

The decree will be modified in these respects and affirmed. No costs will be granted to either party.

BROOKE, C. J., and KUHN, STONE, OSTRANDER, MOORE, and STEERE, JJ., concurred.

The late Justice MCALVAY took no part in this decision.

Digitized by Google

BARNHART v. PERE MARQUETTE RAILROAD CO.

1. MASTER AND SERVANT—CONTRIBUTORY NEGLIGENCE—SECTION MEN —DUTY.

Where plaintiff brought an action for injuries sustained in being run down by defendant's train, and the evidence showed that he, with other section men, was engaged in cleaning off snow from several switches, in the city of Lansing, that plaintiff, in obedience to general instructions, started, after clearing off one switch, to work on another, and, with his cap pulled down over his ears, during a snow storm, ventured on the main track after one train had passed, and failed to look for or observe a train that was following, he was chargeable with the knowledge that the work was of a dangerous nature and he was bound to take reasonable precautions to protect himself from perils arising therefrom, and was guilty of contributory negligence.

2. SAME—WARNING—SIGNALS—DUTY TO WHISTLE.

An employee working as a section hand is not entitled to recover for negligence in failing to sound the statutory signals for a crossing. 2 Comp. Laws, § 6292.

3. SAME—FELLOW SERVANTS—COMPARATIVE NEGLIGENCE.

The question of comparative negligence under Act No. 104, Pub. Acts 1909, was not a question of fact for the jury, but was correctly decided by the trial court as a question of law, since the failure of the engineer to discover plaintiff on the track was of lesser degree than plaintiff's want of care.

4. SAME—SAFE PLACE—NEGLIGENCE.

The defendant was not chargeable with a violation of the duty to provide a safe place, the track being used for the very purpose for which it was intended, and being rendered unsafe by the act of the employee.

5. SAME—EVIDENCE—VIOLATION OF ORDINANCE.

Nor could he recover for violation of a city ordinance relating to the speed of trains, when it was not introduced in evidence.

Digitized by Google

Error to Ingham; Collingwood, J. Submitted November 10, 1914. (Docket No. 151.) Decided December 21, 1915.

Case by Sherman T. Barnhart against the Pere Marquette Railroad Company and Michigan Central Railroad Company for personal injuries. Judgment for defendant on a directed verdict. Plaintiff brings error. Affirmed.

Warner, Raudabaugh & Person, for appellant.

Samuel H. Kelley, for appellee Michigan Central Railroad Co.

Parker, Shields & Brown (*Cummins, Nichols & Rhoads*, of counsel), for appellee Pere Marquette Railroad Co.

BIRD, J. Plaintiff was employed as a section hand by the Michigan Central Railroad in December, 1911. The section upon which he was employed commenced about 1,000 feet south of Franklin avenue in the city of Lansing, and extended north to Chandler's marsh. On the night preceding the 21st of February, 1912, there was a heavy snowfall, and the snow continued to fall and blow during the forenoon of that day. By reason of the storm, plaintiff and his co-workers were called out early to clear the snow from the interlocking switches. After cleaning the last switch, which was situate about 500 feet south of Franklin avenue, the men were ordered by the foreman to take shelter for a time behind a box car standing on a parallel track to the main track, and which was called the scale track, while he went after his mail. The men acted upon his suggestion and after remaining there for a time, plaintiff was seen to place his broom under his

Digitized by Google

arm and start toward the switch which they had last cleaned. In doing so, he took a southeasterly course, and was soon on the south-bound main track, down which he traveled toward the switch. A few moments later, a Pere Marquette passenger train (which used the tracks jointly with the Michigan Central) was observed by the men and foreman, following close behind him. They called to him, and the foreman threw a mail box he was carrying at him, in the attempt to call his attention to the train, but presumably by reason of the storm he did not hear them, and the train struck him and injured him so badly that later he lost one of his legs by amputation. The negligence with which the defendants were charged was:

(1) The failure to furnish a safe place in which to perform his duties; (2) the failure to give the statutory crossing signals; (3) operating the train at a speed in excess of that allowed by an ordinance of the city of Lansing; (4) the failure to give heed in operating the train to the fact that it was late, and of the storm conditions.

The trial resulted in a directed verdict for the defendants, on the ground of plaintiff's contributory negligence.

When plaintiff engaged in this line of work he knew that it was more or less hazardous by reason of the frequent operation of trains, and the law placed upon him the duty of exercising reasonable care to protect himself against injury. *Schaible* v. *Railway Co.*, 97 Mich. 318 (56 N. W. 565, 21 L. R. A. 660); *Aerkfetz* v. *Humphreys*, 145 U. S. 418 (12 Sup. Ct. 835); *Daly* v. *Railway Co.*, 105 Mich. 193 (63 N. W. 73); *Carlson* v. *Railroad Co.*, 120 Mich. 481 (79 N. W. 688).

Standing beside the box car on the scale track, he was in a place of comparative safety. The proof tends to show quite conclusively that he was not ordered at that time to clean the switch again, unless it can be

Digitized by Google

said that a general order, which had been given them to keep the switches clean, would suffice. But conceding that his action was in obedience to the general order, there was no occasion for his traveling down the main track to reach the switch, as the very track he started from led to the switch. Instead of traveling down the scale track, he crossed over and went onto the main track, and thereby incurred dangers which he could have, with less trouble, avoided, and he did this on a cold stormy morning, with his cap pulled down partially over his ears, when the weather conditions rendered it very difficult for him to see or hear an approaching train. He also did this with a full knowledge that he was on the south-bound main track, and that trains were being operated over it in the same direction in which he was traveling, and yet, the proof shows that he did not look back, after he started, to protect himself from approaching trains. Considering his conduct independently of Act No. 104, Pub. Acts 1909, it was a plain case of contributory negligence, which will bar his right to recover.

But it is urged that, even if he were guilty of contributory negligence, the defendants were also guilty of negligence, and under Act No. 104, the question as to which was the more negligent should have been submitted to the jury. We do not think that the charges of negligence against the defendant can be sustained, unless it can be said that the engineer was negligent in failing to discover and warn the plaintiff. Respecting the grounds of negligence, it may be said that the doctrine of "safe place" is not involved. The place was safe, and was being used for the very purpose for which it was constructed, and was rendered unsafe for plaintiff only by his own act. The defendants did not owe him the duty of giving the statutory crossing signals. *Lepard* v. *Railroad Co.*, 166 Mich. 373 (130 N. W. 668, 40 L. R. A. [N. S.] 1105). Nothing can be

Digitized by Google

predicated upon the operation of the train at a speed in excess of that allowed by the ordinance, because the ordinance was not introduced. If we concede that the engineer was negligent in that he did not discover plaintiff on the track and warn him, we are still of the opinion, in view of the storm conditions, that that negligence was clearly of a lesser degree than the negligence of the plaintiff.

While ordinarily questions arising under this statute are questions of fact to be determined by a jury, we are of the opinion that where it is clear that the negligence of the plaintiff is not of a lesser degree than that of the defendant, we should control the verdict as a matter of law. *English* v. *Railroad Co., ante,* 286 (154 N. W. 98); *Chicago, etc., R. Co.* v. *Still,* 19 Ill. 499 (71 Am. Dec. 236). See, also, *Sonsmith* v. *Railroad Co.,* 173 Mich. 57 (138 N. W. 347). We think this is such a case, and we therefore hold, as a matter of law under the proofs, that plaintiff's negligence was not of a lesser degree than the negligence of the defendants, thereby affirming the view of the trial court. The judgment is affirmed.

BROOKE, C. J., and STONE, OSTRANDER, and STEERE, JJ., concurred with BIRD, J.

KUHN, J. (*concurring*). Act No. 104, § 2, Pub. Acts 1909, provides as follows:

"In all actions hereafter brought against any such common carrier railroad company under or by virtue of any of the provisions of this act to recover damages for personal injury to an employee, or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery: *Provided,* that the negligence of such employee was of a lesser degree than the negligence of such company, its officers, agents or employees."

Digitized by Google

As Mr. Justice BIRD says in his opinion, the question to determine is whether we should say, as a matter of law—

"that the negligence of such employee was of a lesser degree than the negligence of such company, its officers, agents, or employees."

In the consideration of this question, in my opinion, the same rule should govern as has been laid down by this court in considering whether or not the question of contributory negligence should be determined as a matter of law. We have held in numerous cases that where the evidence is conflicting, or where different conclusions might reasonably be drawn from established or conceded facts, the question belongs to the jury. *Becker* v. *Railway Co.*, 121 Mich. 580 (80 N. W. 581); *Haines* v. *Railway Co.*, 129 Mich. 475 (89 N. W. 349); *Welch* v. *Railroad Co.*, 147 Mich. 207 (110 N. W. 1069); *Amanta* v. *Railroad Co.*, 177 Mich. 280 (143 N. W. 76); *Atchison, etc., R. Co.* v. *Wilkie*, 77 Kan. 791 (90 Pac. 775, 11 L. R. A. [N. S.] 963, and note; 127 Am. St. Rep. 464, 15 Am. & Eng. Ann. Cas. 731). The question here, therefore, is, Can any other inference be fairly and reasonably drawn from the facts but that the negligence of the employee was of a greater degree than the negligence of the company?

I concur in the conclusion of Mr. Justice BIRD that it is clearly apparent that no candid and intelligent man could reach any different conclusion but that the negligence of the defendant's engineer was of a lesser degree than the negligence of the plaintiff. The plaintiff was walking on the tracks in the yard, with full knowledge that trains were being operated on the track on which he was walking, in the same direction, and he made no effort to ascertain whether a train was coming. The negligence of the engineer operating the train, under the weather conditions prevailing, was

Digitized by Google

without question of a lesser degree. I therefore concur in holding that the question in this case should be determined as a matter of law.

MOORE, J., concurred with KUHN, J.

The late Justice MCALVAY took no part in this decision.

HANNULA v. CLEVELAND CLIFFS IRON CO.

1. MASTER AND SERVANT—MINES—CONTRACT.

Though one mining corporation owned a majority of the stock and controlled the business and policy of another, for which plaintiff worked, the dominant company was not responsible for injuries sustained by the plaintiff, who was informed by his time check, whenever he had occasion to sign it, who was the real employer, and had notice by the name on his brass pay check that he was employed by the subservient corporation.

2. SAME—ADMISSIONS—ATTORNEY AND CLIENT—EVIDENCE—APPEAL AND ERROR—HARMLESS ERROR.

Though letters exchanged between plaintiff's attorney and the attorney for defendant mining company who had authority to advise persons relative to the management of the mine, the correspondence containing his admission that defendant was operating the mine in which plaintiff was employed, later retracted by a second letter which advised plaintiff that another corporation was operating the mine, were admissible as evidence of the ownership and control of the property, the court did not, in rejecting the proofs, prejudice plaintiff, who was not misled, since suit had already been commenced when he received the letters.

Digitized by Google

Error to Marquette; Flannigan, J. Submitted January 25, 1915. (Docket No. 37.) Decided December 21, 1915.

Case by Arthur Hannula against the Cleveland Cliffs Iron Company for personal injuries. Judgment for defendant on a directed verdict. Plaintiff brings error. Affirmed.

Le Gendre & Driscoll, for appellant.

William P. Belden, for appellee.

BIRD, J. Plaintiff was injured while working as a trammer in the Hard Ore mine, in Marquette county, under such circumstances that he claims that he is entitled to recover compensation therefor. His right to recover does not seem to be controverted by defendant's counsel; but he insists that, if plaintiff is entitled to compensation, the Cleveland Iron Mining Company is liable therefor, and not the defendant. At the close of the case, the trial court directed a verdict for the defendant on the ground that the plaintiff had sued the wrong party.

It appeared without contradiction that the mine in which plaintiff was working when he received his injuries was the property known in that vicinity as the Hard Ore mine; that the Hard Ore mine is now, and has been, owned by the Cleveland Iron Mining Company for many years; that the Cleveland Iron Mining Company is a Michigan corporation; that the capital stock of the Cleveland Iron Mining Company is owned, save nine shares, by the defendant; that plaintiff had worked in this mine about five months prior to receiving his injuries; that when employed he had been given a brass check which bore his number, and the initials "C. I. M. Co."; and that he had each month received and signed a statement, or time check, in the following form:

Digitized by Google

TIME STATEMENT.

Arthur Hannula. No. 157
In Acct. with Cleveland Iron Mining Co. Hard Ore.
For April, 1909.

Credits.		
By 15¼ Shifts at $2.63		$40.10
Debits.		
For doctor	$1.00	
For benefit fund	.30	1.30
Balance as per pay roll		$30.80

Received payment in full for the above services.
[Signed] ADOLPH HANNULA.

(Sign Here)

After signing this statement, he was paid with a check of the defendant, upon which was printed in large type the words "Hard Ore Pay Roll Checks."

The plaintiff defended his course in launching the case against the defendant on the facts herein recited, and on the additional facts that the printed rules of the mining company were promulgated and signed by the defendant; that the defendant paid to the employees the club or insurance money in case of accident to them at its main office; that plaintiff understood that he was working for defendant; and that it was generally understood in the vicinity of the mine that it was being operated by the defendant. The contention of plaintiff's counsel is that this testimony raised a question of fact as to whether defendant was operating the mine, and, further, that even if defendant was not operating the mine, its acts in connection therewith were such as to estop it from denying that it was operating the property.

1. The proofs establish beyond dispute that the Cleveland Iron Mining Company is a corporation, and was not only the owner of the property, but was actually operating it. Undoubtedly, the defendant dictated the policy of the company as is usually done by the dominant interest in nearly all corporations,

Digitized by Google

whether that interest be owned by individuals or by other corporations. Plaintiff argues that that domination had the appearance of operation, and that he was misled by it into believing that defendant was actually operating the property. This contention would have much force with us were it not for the fact that plaintiff was advised in writing each month when he signed his time check who his employer was. His brass check, which he was obliged to produce when he received his pay, advised him of the same fact. It is not clear to us how plaintiff could have been advised with more certainty by whom he was employed. Measuring it by the ordinary business standards, the possession of such facts would be held sufficient to charge one with knowledge as to who his employer was, and therefore it must be conclusive upon plaintiff in this case.

2. In a telegram plaintiff's counsel inquired of defendant's counsel whether defendant was operating the mine. The reply was in the affirmative. Soon after, however, a letter followed in which defendant's counsel corrected the information given, and advised that the Cleveland Iron Mining Company was operating it. It was conceded that defendant's counsel had the authority to give out such information and that both letters should be considered together. The letters were offered by plaintiff and rejected on the ground that the second letter rendered the first one of no value as evidence. This ruling is assigned as error.

At the stage of the trial at which the letters were offered, we think they were admissible, because they bore upon the main issue as to which company was operating the mine; but the harmful effect of the ruling was neutralized subsequently by the admissions of plaintiff upon his cross-examination. It does not appear that plaintiff was misled by the letters into commencing the suit against the defendant, as the letters

Digitized by Google

were written some considerable time after the suit was started. Had these letters been received in evidence, we should have been obliged to reach the same conclusion based upon the plaintiff's own testimony. The error was harmless.

We are of the opinion that the view taken of the matter by the trial court was the proper one, and the judgment will be affirmed.

BROOKE, C. J., and KUHN, STONE, OSTRANDER, MOORE, and STEERE, JJ., concurred.

The late Justice MCALVAY took no part in this decision.

WOOD *v.* CITY OF DETROIT.

1. CONSTITUTIONAL LAW—WORKMEN'S COMPENSATION AS APPLIED TO MUNICIPAL CORPORATIONS—DUE PROCESS OF LAW.

   Act No. 10, Extra Session 1912, as amended, bringing all municipal corporations of the State within the provisions in the statute establishing workmen's compensation, is not in excess of the recognized powers of the legislature, which has been held in several cases arising in different States to have authority to abolish the common law defenses of contributory negligence and assumed risk and to abrogate the fellow-servant rule.

2. SAME—EQUAL PROTECTION OF THE LAW—CORPORATIONS.

   Nor is the statute unconstitutional because it affects municipal corporations differently from private corporations, in that private corporations are permitted to elect whether or not they shall become subject to the law, while municipal corporations have no option. The classification so

Digitized by Google

created is not invalid, and does not deprive a municipal corporation of the equal protection of the laws.

3. SAME—LOCAL SELF GOVERNMENT—MUNICIPAL CORPORATIONS.
Under the new Constitution the right of local self government granted to municipal corporations does not deprive the legislature of its authority to regulate such public instrumentalities by general enactments affecting their private governmental functions.

4. SAME—NEGLIGENCE—FEDERAL CONSTITUTION.
No constitutional right of the corporation is infringed because the statute compels the municipality to respond in damages to servants who may have been injured without fault of the employer: since the legislature has the power to determine on what terms municipal corporations shall be allowed to engage in the employment of labor, if at all, the collective and individual rights of the citizens being duly preserved.[1]

Certiorari to the Industrial Accident Board. Submitted January 14, 1915. (Docket No. 93.) Decided December 21, 1915.

Mary Wood presented her claim for compensation for the death of Henry H. Davenport while in the employ of the Public Lighting Commission of the city of Detroit. An order was entered awarding compensation. The city of Detroit brings certiorari. Affirmed.

Louis H. Wolfe and *Chester L. Schwartz* (*Maurice E. Fitz-Gerald* and *Samuel W. Shier*, of counsel), for claimant.

William E. Tarsney (*Richard I. Lawson*, of counsel), for defendant.

Grant Fellows, Attorney General, and *L. W. Carr*, Assistant Attorney General, *amici curiæ*.

[1] On the constitutionality of compulsory industrial insurance, see note in 37 L. R. A. (N. S.) 466.

Digitized by Google

OSTRANDER, J. In March, 1914, an employee of the Public Lighting Commission of the city of Detroit in the course of his employment was killed. The Industrial Accident Board affirmed an award to a member of the family of the deceased made under the provisions of Act No. 10, Pub. Acts 1912 (Extra Session), overruling the contention of the city that, as applied to municipal corporations, the act is void. The act is entitled:

"An act to promote the welfare of the people of this State, relating to the liability of employers for injuries or death sustained by their employees, providing compensation for the accidental injury to or death of employees and methods for the payment of the same, establishing an industrial accident board, defining its powers, providing for a review of its awards, making an appropriation to carry out the provisions of this act, and restricting the right to compensation or damages in such cases to such as are provided by this act."

The propositions of plaintiff in certiorari are that the effect of the act, in operation, is to deprive it of its property without due process of law, the legislature being without power to compel it to respond in damages to an employee injured without its fault; that by the terms and operation of the law, and in respect to its private and proprietary functions and powers, its rights and the similar rights of individuals and of private corporations are not equally protected. It is also contended that in the home rule act the legislature exhausted its powers and may not by the act in question affect municipal affairs as it has assumed to do. On the other hand, the claimant, the defendant in certiorari, presents points which are stated in the brief as follows:

"(1) That Act No. 10, Public Acts 1912, Extra Session, is constitutional and is within the police power of the State; and that the State has absolute control of municipalities.

Digitized by Google

"(2) That the legislature in passing Act No. 279 in 1909, known as the home rule bill, did not relinquish its control or its further guidance or restrictive powers as to municipalities; that the provision in the Constitution, made in 1908, in which it is stated that the legislature shall provide a general law for the incorporation of cities and villages with reference to the rate of taxation for municipal purposes and restricting their powers to borrow money and contracting debts, did not prevent the legislature from passing a law such as Act No. 10, Public Acts 1912, Extra Session.

"(3) The appellee contends that municipalities, such as cities, villages, towns, townships, and counties are not discriminated against in Act No. 10 of the Public Acts 1912, Extra Session; that the legislature did not exceed its authority in passing a measure which compels an employer (municipality) to pay money to an employee who is injured while within the scope of his employment, whether or not the employer (municipality) is negligent in any degree."

A workmen's compensation act has been held to be invalid, because compulsory, in *Ives* v. *Railway Co.*, 201 N. Y. 271 (94 N. E. 431, 34 L. R. A. [N. S.] 162, Am. & Eng. Ann. Cas. 1912B, 156), and valid, though compulsory, in *State, ex rel. Davis-Smith Co.*, v. *Clausen*, 65 Wash. 156 (117 Pac. 1101, 37 L. R. A. [N. S.] 466). The New York decision was made in March, 1911. In November, 1913, the constitution of New York was amended (article 1, § 19), and it has since been held (*Jensen* v. *Southern Pacific Co.*, 215 N. Y. 514 [109 N. E. 600]) that the constitutional amendment meets the objections suggested by the court and sustains the present act, which differs essentially from the one considered in the *Ives Case*. See, also, *State, ex rel. Yaple*, v. *Creamer*, 85 Ohio St. 349 (97 N. E. 602, 39 L. R. A. [N. S.] 694), and *Porter* v. *Hopkins*, 91 Ohio St. 74 (109 N. E. 629). The broad question discussed in the cases referred to is not before us. The questions here are whether the legislature may

Digitized by Google

impose the obligation upon a municipal corporation, and, if it may, then whether the act discriminates, unlawfully, between such corporations and others affected by the act.

It is well to inquire what will be the effect of the law in application to actual affairs, and especially in what way, if in any, it affects, differently, municipal corporations and private corporations and individuals.

Excepting employers of domestic and farm labor, the act abolishes certain defenses in actions for personal injuries as to all employers, in all cases except cases where an employee gives notice that he will not be bound by the act. These defenses are available to an individual or a private corporation in a suit brought by an employee who has so given notice. In no case are they available to a municipal corporation, because its employees are in any event, in express terms, bound by the act. The defenses referred to are: (1) That the employee was negligent, unless wilfully so; (2) that the injury was caused by the negligence of a fellow servant; (3) that the employee had assumed the risks inherent in, incidental to, or arising out of his employment, or arising from failure of the employer to provide and maintain safe premises and suitable appliances.

Probably no one will now deny the power of the legislature to abolish these defenses. See *Opinion of Justices,* 209 Mass. 607 (96 N. E. 308); *Ives* v. *Railway Co.,* 201 N. Y. 271 (94 N. S. 431, 34 L. R. A. [N. S.] 162, Am. & Eng. Ann. Cas. 1912B, 156); *Quackenbush* v. *Railroad Co.,* 62 Wis. 411 (22 N. W. 519); *Id.,* 71 Wis. 472 (37 N. W. 834); *Employers' Liability Cases,* 207 U. S. 463 (28 Sup. Ct. 141); *Kiley* v. *Railway Co.,* 138 Wis. 215 (119 N. W. 309, 120 N. W. 756); *Wilmington Star Mining Co.* v. *Fulton,* 205 U. S. 60 (27 Sup. Ct. 412); *Minnesota Iron Co.* v. *Kline,* 199 U. S. 593 (26 Sup. Ct. 159);

Digitized by Google

Hall v. *Mill Co.*, 39 Wash. 447 (81 Pac. 915, 4 Am. & Eng. Ann. Cas. 587); *Johnson* v. *Southern Pacific Co.*, 196 U. S. 1 (25 Sup. Ct. 158); *Walker* v. *Railroad Co.*, 135 N. C. 738 (47 S. E. 675); *Mott* v. *Railway Co.*, 131 N. C. 234 (42 S. E. 601); *Cogdell* v. *Railway Co.*, 129 N. C. 398 (40 S. E. 202); *Thomas* v. *Railroad Co.*, 129 N. C. 392 (40 S. E. 201); *Carterville Coal Co.* v. *Abbott*, 181 Ill. 495 (55 N. E. 131); *Odin Coal Co.* v. *Denman*, 185 Ill. 413 (57 N. E. 192, 76 Am. St. Rep. 45); *D. H. Davis Coal Co.* v. *Polland*, 27 Ind. App. 697 (60 N. E. 1124); *Island Coal Co.* v. *Swaggerty*, 159 Ind. 664 (62 N. E. 1103, 65 N. E. 1026); *United States Cement Co.* v. *Cooper* (Ind. App.), 82 N. E. 981; *Hailey* v. *Railway Co.*, 113 La. 533 (37 South. 131); *Kilpatrick* v. *Railway Co.*, 74 Vt. 288 (52 Atl. 531, 93 Am. St. Rep. 887); *Johnson* v. *Coal Co.*, 88 Ark. 243 (114 S. W. 722, 123 S. W. 1180, 19 L. R. A. [N. S.] 646); *Coley* v. *Railroad Co.*, 129 N. C. 407 (40 S. E. 195, 57 L. R. A. 817); *Lore* v. *Manufacturing Co.*, 160 Mo. 608 (61 S. W. 678); *Mobile, etc., R. Co.* v. *Turnipseed*, 219 U. S. 35 (31 Sup. Ct. 136, 32 L. R. A. [N. S.] 226, Am. & Eng. Ann. Cas. 1912A, 463); *Ditberner* v. *Railway Co.*, 47 Wis. 138 (2 N. W. 69); *Missouri Pacific R. Co.* v. *Haley*, 25 Kan. 35; *Missouri Pacific R. Co.* v. *Mackey*, 33 Kan. 298 (6 Pac. 291); *Bucklew* v. *Railway Co.*, 64 Iowa, 603 (21 N. W. 103); *McAunich* v. *Railroad Co.*, 20 Iowa, 338; *Vindicator, etc., Mining Co.* v. *Firstbrook*, 36 Colo. 498 (86 Pac. 313, 10 Am. & Eng. Ann. Cas. 1108); *Deppe* v. *Railroad Co.*, 36 Iowa, 52; *Peirce* v. *Van Dusen*, 78 Fed. 693 (24 C. C. A. 280, 69 L. R. A. 705); *Campbell* v. *Cook*, 86 Tex. 630 (26 S. W. 486, 40 Am. St. Rep. 878); *Thompson* v. *Railroad & Banking Co.*, 54 Ga. 509; *Georgia Railroad* v. *Ivey*, 73 Ga. 499; *Missouri Pacific R. Co.* v. *Castle*, 172 Fed. 841 (97 C. C. A. 124); *Missouri Pacific R. Co.* v. *Mackey*, 127 U. S. 205 (8 Sup. Ct. 1161).

Digitized by Google

But abolishing these defenses, except as against an employee who refuses to be bound by the act, is not the sole, nor main, purpose of the act. Obviously, it is an inducement, somewhat coercive in character, for accomplishing what the legislature regarded as a desirable result. With the particular defenses abolished, there would still be actions in which the liability of the employer would be debatable, and many injuries of employees are attributable to pure accident. The individual and the private corporation employing labor, and refusing to be bound by the act, may elect to contest, though with limited defenses, liability for injuries; municipal corporations may not. In this respect, only, the act affects, differently, municipal corporations and other corporation and individual employers of labor. It expressly provides that "the State, and each county, city, township, incorporated village and school district therein, and each incorporated public board or public commission in this State authorized by law to hold property and to sue or be sued generally" shall constitute employers subject to the provisions of this act. Act No. 50, Pub. Acts 1913. And no distinction is suggested between employment in work heretofore classified as governmental in character, or involving the exercise on the part of the corporation of governmental power, and employment in work heretofore classified as private in character.

As to the first question presented, namely, the power of the legislature to impose upon municipal corporations the duties and liabilities created by the act, I think there would have been, under our former Constitutions, no reasonable doubt. So long as it was admitted (*People* v. *Hurlbut*, 24 Mich. 44 [9 Am. Rep. 103]; *Board of Park Commissioners* v. *Common Council of Detroit*, 28 Mich. 228), that the State, through the legislature, must determine for each of its municipal corporations the powers it should exercise and the

Digitized by Google

capacities it should possess, and that it must also decide what restrictions should be placed upon them, "as well to prevent clashing of action and interest in the State as to protect individual corporators against injustice and oppression at the hands of the local majority," it followed that municipal activity in the employment of labor, if permitted at all, might be permitted only upon compliance with such conditions as are found in the act here considered. In *Atkin* v. *Kansas*, 191 U. S. 207 (24 Sup. Ct. 124), there was involved the validity, with respect to the Fourteenth Amendment to the Constitution of the United States, of a statute of Kansas which, after fixing eight hours as a day's work for all laborers employed by or on behalf of the State, or any of its municipalities, made it unlawful for any one contracting to do any public work to require or permit any laborer to work longer than eight hours per day, and required contractors to pay the current rate of daily wages, which it appeared were fixed, as to private work, upon ten hours' daily labor. A contractor was convicted and sentenced for disobedience of the act. In the opinion of the court, it is said, among other things:

"'If a statute,' counsel observes, 'such as the one under consideration is justifiable, should it not apply to all persons and to all vocations whatsoever? Why should such a law be limited to contractors with the State and its municipalities? * * * Why should the law allow a contractor to agree with a laborer to shovel dirt for ten hours a day in performance of a private contract, and make exactly the same act under similar conditions a misdemeanor when done in the performance of a contract for the construction of a public improvement? Why is the liberty with reference to contracting restricted in the one case and not in the other?'

"These questions—indeed, the entire argument of defendant's counsel—seem to attach too little consequence to the relation existing between a State and its municipal corporations. Such corporations are the

Digitized by Google

creatures, mere political subdivisions, of the State for the purpose of exercising a part of its powers. They may exert only such powers as are expressly granted to them, or such as may be necessarily implied from those granted. What they lawfully do of a public character is done under the sanction of the State. They are, in every essential sense, only auxiliaries of the State for the purposes of local government. They may be created, or, having been created, their powers may be restricted or enlarged, or altogether withdrawn at the will of the legislature; the authority of the legislature, when restricting or withdrawing such powers, being subject only to the fundamental condition that the collective and individual rights of the people of the municipality shall not thereby be destroyed."

But it is argued, in effect at least, and the point is self-intruding into any discussion of the subject, that the Constitution of 1909 has taken from the legislature the power to grant or refuse to municipal corporations the exercise of certain powers and the possession of certain capacities, and so has denied the power of the legislature to restrict and control provident and necessary action of municipalities in exercising powers which the Constitution itself has given to them. In other words, the so-called private capacities of municipal corporations enumerated in the Constitution may be employed precisely as like capacities and activities of private corporations may be employed in so far as legislative control is concerned.

In a recent case, in considering the right of a city while operating its electric light plant and supplying its inhabitants with current to also in that connection do electrical wiring on private premises and furnish fixtures and other accessories essential and convenient in using electricity, and sustaining the right, we said:

"The old law of municipal trading, involving the propriety and expediency of authorizing a municipality to engage in general business in competition with its citizens conducting a private business of like kind, has

Digitized by Google

little bearing here; but the rule remains that taxation can only be for public purposes and municipalities have no express or implied power to engage generally in private business. We are past the general question of the validity of legislation authorizing municipal ownership and operation of plants and their necessary equipment to furnish the concentrated population of cities with certain general needs and conveniences, like water, light, heat, transportation, telephone service, etc.; and it is held that the court will not interfere with any reasonable exercise of the implied powers to operate such plants in a business way, and as any private corporation could or would." *Andrews* v. *City of South Haven*, 187 Mich. 294 (153 N. W. 827).

The Constitution of 1909 contains the following (article 8):

"Sec. 20. The legislature shall provide by a general law for the incorporation of cities, and by a general law for the incorporation of villages; such general laws shall limit their rate of taxation for municipal purposes, and restrict their powers of borrowing money and contracting debts.

"Sec. 21. Under such general laws, the electors of each city and village shall have power and authority to frame, adopt and amend its charter, and, through its regularly constituted authority, to pass all laws and ordinances relating to its municipal concerns, subject to the Constitution and general laws of this State.

"Sec. 22. Any city or village may acquire, own, establish and maintain, either within or without its corporate limits, parks, boulevards, cemeteries, hospitals, almshouses and all works which involve the public health or safety.

"Sec. 23. Subject to the provisions of this Constitution, any city or village may acquire, own and operate, either within or without its corporate limits, public utilities for supplying water, light, heat, power and transportation to the municipality and the inhabitants thereof; and may also sell and deliver water, heat, power and light without its corporate limits to an amount not to exceed twenty-five per cent. of that furnished by it within the corporate limits; and may operate transportation lines without the municipality

Digitized by Google

within such limits as may be prescribed by law: *Provided,* that the right to own or operate transportation facilities shall not extend to any city or village of less than twenty-five thousand inhabitants.

"Sec. 24. When a city or village is authorized to acquire or operate any public utility, it may issue mortgage bonds therefor beyond the general limit of bonded indebtedness prescribed by law: *Provided,* that such mortgage bonds issued beyond the general limit of bonded indebtedness prescribed by law shall not impose any liability upon such city or village, but shall be secured only upon the property and revenues of such public utility, including a franchise stating the terms upon which, in case of foreclosure, the purchaser may operate the same, which franchise shall in no case extend for a longer period than twenty years from the date of the sale of such utility and franchise on foreclosure."

The general law passed pursuant to the constitutional provision is Act No. 279, Pub. Acts 1909, amended in some respects by Act No. 203, Pub. Acts 1911, and by Act No. 5, Pub. Acts 1913. Of this legislation is may be said, generally, that it recognizes and provides for the exercise of the right of cities to acquire and control property in accordance with their charters, which they may make, revise, or amend within certain limitations. Among other things, the charters may provide:

"(*i*) For the purchase of the franchises, if any exist, and of property used in the operation of companies or individuals engaged in the plank road, cemetery, hospital, almshouse, electric light, gas, heat, water and power business; and in cities having not less than twenty-five thousand inhabitants the purchase of the franchise, if any, and the property of street railway and tram railway companies, State and county taxes shall be paid upon such transportation property so purchased and owned by any such city."

"(*s*) For the exercise of all municipal powers in the management and control of municipal property and in the administration of the municipal government, whether such powers be expressly enumerated or not;

Digitized by Google

for any act to advance the interest of the city, the good government and prosperity of the municipality and its inhabitants, and through its regularly constituted authority to pass all laws and ordinances relating to its municipal concerns, subject to the Constitution and general laws of this State."

The city of Detroit, the plaintiff in certiorari, exists under a special charter, being of the class referred to in section 2 of the act as follows:

"Each city now existing shall continue with all its present rights and powers until otherwise provided by law."

It has, however, as is matter of common knowledge, amended its charter in various respects, not here of importance. It possessed, before the Constitution was adopted, various powers relating to the acquisition, ownership, and control of property, and still possesses these powers and in their exercise has acquired and owns property, real and personal, which is operated by the city. In the management and control of this property and in the exercise of powers concerning streets and public places, it employs and pays many men.

Counsel for plaintiff in certiorari say:

"If the municipality in its private business capacity is a private corporation, it is then entitled to the same right of election as every other private corporation; and if this act is compulsory in its features as applied to the municipality, it then compels the municipality to pay its injured employees, and results in the taking away of the municipality's property (its money) without due process of law, for the reason that by due process of law is meant the right to have laws operate on all alike, not subjecting the individuals to the arbitrary exercise of the powers of government unrestrained by the established principles of private right and distributive justice."

The Constitution of 1909 has pointed out the extent of the local powers and capacities of cities and villages with more precision than was done in former Consti-

Digitized by Google

tutions, thus restricting the power of the legislature to grant or to deny to particular communities the enumerated capacities and powers, at will, but it has not abolished all distinctions between municipal and other corporations and individuals with respect to the exercise of the powers conferred nor denied the power of the legislature to enact general laws applicable to cities. The distinction between powers governmental in character and those private in character, as exercised by municipal corporations, does not involve the abrogation of the distinction between private municipal activity and private individual activity. To employ a seeming paradox, private municipal activities are all of them public. What has been called private in municipal activity is, nevertheless, public when contrasted with purely private enterprise and adventure.

There remains, and always must remain, the distinction pointed out in the opinion last referred to. The actual basis for the carrying on by municipal corporations of private municipal business is taxation. There is not, and there cannot be, any merely local power to tax persons or property, and municipal activity may still be, and it is the command of the Constitution that it shall be, restricted, limited, by the limitation of the power to tax, to borrow money and to exploit the municipal credit. Moreover, municipal corporations are still State agencies, and as such subject to legislative direction and control, none the less so because the exercise of such control may indirectly affect a private municipal activity. The act, in its application to municipalities, involves no right of local self-government, or local control and management of corporate property. It deprives the municipality of none of its property, because, in effect, it is made lawful to raise by tax the money required to pay all injured employees some compensation. A new public purpose for which taxes may be levied is declared.

Digitized by Google

The subject of the legislation which is in question here is a social subject, in its very nature referable for community action to the State itself. A social theory needed to be crystallized into law. Its nature was such that no community less than the State could be appealed to for this purpose. The theory of this and of similar legislation includes the essential idea that the industrial worker is himself a social asset and ought not, in any case, to bear the whole result of a personal injury arising out of and in the course of his employment; that society at large ought to share the loss. The subject is one of governmental control, of public policy, necessarily committed to the legislature. Whether it is or is not denominated a police regulation, municipal corporations are, for the purpose of carrying out such a measure, subject to legislative control. The first question is therefore answered adversely to the plaintiff in certiorari.

The second question, namely, whether the classification of employers as municipal and other can be defended, is, in principle, answered by what has been already said. The legislature was confronted with the duty to devise a plan, complete in itself, for dealing with the subject and accomplishing the desired purpose. The limitation upon its power in this direction is the Constitution, which I think it has not contravened. The burden created, if it can be called a burden, is uniform as to each individual of each class. There is no vested right of any person to labor for a municipal corporation.

There is also a consideration of expediency which may have influenced the legislature. Private corporations and individuals exploit private capital. Out of this, in the first instance, the compensation of employees must be paid. The burden thus assumed by the employer must be distributed by his action in the course of his business. In the case of a municipal cor-

Digitized by Google

poration the burden assumed by it as employer is distributed, immediately and finally, upon the community subject to be taxed to raise the necessary fund. However that may be, there is found in the imposition of the law upon municipal corporations no invasion of private rights, but only the enforcement of a State policy which, in view of municipal activities, ought to be uniformly accepted and observed by all municipal corporations.

The order of the Industrial Accident Board is affirmed.

BROOKE, C. J., and KUHN, STONE, BIRD, MOORE, and STEERE, JJ., concurred.

The late Justice MCALVAY took no part in this decision.

TYLER v. WRIGHT.

1. TRIAL—SPECIAL VERDICT—QUESTIONS.
   Special questions in ejectment so framed that, taken singly or as a whole, they call for findings that may be conclusive of the principal issue, should be submitted to the jury, if proper in form and in substance.

2. SAME—RES JUDICATA—EVIDENCE—ESCROW.
   Plaintiff brought ejectment for a parcel of land that defendant claimed by adverse possession of her predecessor in title. In a suit brought by plaintiff's grantor prior to the ejectment proceedings, the court had adjudged a deed invalid that had been deposited in escrow with her father, defendant's said predecessor, by his wife to his daughter,

Digitized by Google

the court holding that the proof of a sufficient delivery was incomplete. It was again offered in evidence for the sole purpose of showing the attitude of the father, who received it in escrow. *Held*, that the former judgment, while conclusive of the validity of the instrument, did not bar proof of the mental attitude of the father in relation to any possible claim of title.

3. SAME—CHARGE—INSTRUCTIONS AS TO BURDEN OF PROOF—EVIDENCE.

In an action of ejectment instructions that the burden was on defendant to convince the jury by a "fair" preponderance of the evidence that the adverse holder had occupied the premises long enough to acquire title, while objectionable, because the court employed the word "fair," were not so prejudicial as to require reversal of the judgment for that cause.

4. EVIDENCE—RES JUDICATA—FORMER JUDGMENT—EJECTMENT.

It was error to receive in evidence the files, records and judgment entry of a former judgment in ejectment in the same cause, between the same parties; while it might be competent to show the defendant's omission to claim title by adverse possession at the first trial, as affecting her good faith in afterwards setting up that claim, the prior judgment ought not to have been brought to the notice of the jury; and it was not necessarily final of the issues raised upon the new trial.

Error to Berrien; Barton, J., presiding. Submitted January 13, 1915. (Docket No. 77.) Affirmed December 21, 1915. Reargued June 6, 1916. Former opinion reversed July 21, 1916.

Ejectment by Ida Newland Tyler against Addie Wright, Louis Pector, and Jacob Goodman. Judgment for plaintiff. Defendants bring error. Reversed.

W. C. Hicks and *W. J. Barnard*, for appellants.

Gore & Harvey, for appellee.

BIRD, J. Plaintiff filed a suit in ejectment to recover the possession of a portion of lot 6, block 23,

Digitized by Google

as shown by the original plat of the village (now city) of Benton Harbor. Judgment passed in her favor, and the defendants insist in this court that the judgment ought not to stand because of errors in the trial court.

It was conceded that John Thomas, Sr., owned the premises in fee, and that in May, 1863, he conveyed them to his wife, Katherine I. Thomas, who died intestate in August, 1885, leaving two children, a son and a daughter. The interests of these children were acquired by plaintiff, and are the basis of her claim in this suit. Defendant Addie Wright was in possession of the premises, and claimed the right to retain them by virtue of a life lease which she claims was executed and delivered to her by John Thomas, Sr., a short time prior to his death in August, 1901. She was unable, however, to produce the life lease upon the trial by reason of its having been mislaid or lost, but, instead, offered parol proof of its contents. For the purpose of showing the strength of the life lease, it was the claim of the defendants that John Thomas, Sr., had himself occupied said premises as his home and business place for many years, and that he acquired title thereto by adverse possession during the 16 years which elapsed between his wife's death and his own. It was conceded that plaintiff had the record title. For a further history of the litigation, see 164 Mich. 606 (130 N. W. 205); *Id.* 171 Mich. 579 (137 N. W. 212). The issues in the trial court were two: Did John Thomas, Sr., acquire title to the premises by adverse possession? Did John Thomas, Sr., execute a life lease to defendant Addie Wright?

1. The first assignment of error relates to the refusal of the trial court to submit five special questions tendered by defendants. The two about which the most complaint is made are:

(*a*) "Was John Thomas, Sr., from the death of his

Digitized by Google

wife in 1885, up to the time of his death in 1901, in the actual, continued, visible, notorious, distinct, and hostile possession of the premises described in plaintiff's declaration?"

(*b*) "Did John Thomas, Sr., prior to his death, make and deliver a life lease of the premises mentioned in plaintiff's declaration to Addie Wright?"

Had question (*a*) been submitted and answered in the affirmative, it would not have been inconsistent with the general verdict, because the inference would have been that the jury concluded that the life lease was not made and delivered to Addie Wright. Had question (*b*) been submitted and answered in the affirmative, no inconsistency would have followed, because the inference would then have arisen that the jury concluded that John Thomas, Sr., did not acquire title by adverse possession. Neither question, standing by itself, calls for an answer which would have been controlling. Under the statute which allows the submission of special questions they must be so framed as to call for an answer which may be controlling of the main issue. *Balch* v. *Railroad Co.*, 78 Mich. 654 (44 N. W. 151); *Cousins* v. *Railway Co.*, 96 Mich. 386, and note (56 N. W. 14); *Wells* v. *Railway Co.*, 184 Mich. 289 (151 N. W. 630).

As the other questions tendered were subject to the same infirmity, they need not be considered. We conclude that the refusal of the trial court to submit the questions tendered was not error.

2. The admission in evidence of a deed of these premises from Katherine I. Thomas to her daughter, Katherine Sullivan, in December, 1880, is the basis for an assignment of error. After her mother's death Mrs. Sullivan claimed title to these premises by virtue of this deed which it was claimed had been delivered to her father, with instructions from her mother to deliver it to her. Her brother contested her claim, and was successful in defeating it in this court, on

Digitized by Google

the ground that the proofs failed to show that the deed had been delivered to her father for her benefit. *Thomas* v. *Sullivan*, 138 Mich. 265 (101 N. W. 528).

Plaintiff's counsel offered this deed, and it was admitted against defendants' objection, together with certain statements made by John Thomas, Sr., concerning the deed. The objection to its admission was based upon the invalidity of the deed, it having been so determined by this court, and that therefore it was *res adjudicata*, and could not be again litigated. At the time the deed was offered counsel for the plaintiff stated that it was offered for the purpose of showing the mental attitude of John Thomas, Sr., and not for any other purpose. The trial court, in submitting the case to the jury, guarded it with this instruction:

"At the expense of repetition I may again call your attention to a certain bit of testimony which was admitted and which I will charge you concerning, that concerning the deed, which is argued pro and con, was offered and relied upon, and finally annulled by the Supreme Court. It matters not to you as to whether the Supreme Court nullified and set at naught that deed. The circumstances of the bringing together of the witnesses, and the discussion in the presence of John Thomas, Sr., and by him, of the deed itself, was allowed to show the mental attitude of John Thomas, Sr., with reference to the title of that land. Now, it was offered for that purpose, and no other. * * * For the purpose of giving you the opportunity of weighing his mental attitude so far as shown by that circumstance that evidence was offered and was admitted, and for no other purpose."

If the purpose of offering it had been to retry the old issue, undoubtedly counsel's objection would have been well taken. But it was not offered for that purpose. It was offered for the purpose of showing that what John Thomas, Sr., said with reference to the deed at that time was inconsistent with the claim that the defendant was making for him that he claimed to

Digitized by Google

own the premises. We think the testimony was competent for that purpose.

3. Exception is taken to that part of the charge in which the trial court said to the jury that it was the duty of the defendants to convince them by a fair preponderance of the evidence that John Thomas, Sr., acquired title to the premises by adverse possession. It is argued that, by qualifying the word "preponderance" by the adjective "fair," the jury were given to understand that something more than a preponderance of the evidence was necessary. The propriety of qualifying the word "preponderance" when used in a charge has been many times considered by this court. In *Elliott* v. *Van Buren,* 33 Mich. 49 (20 Am. Rep. 668), the language of the trial court complained of was that "the proof must be clear and conclusive." In *Monaghan* v. *Insurance Co.,* 53 Mich. 238 (18 N. W. 797), the court instructed the jury that "perhaps they ought to be well satisfied of the truth of the charge." In *Hoffman* v. *Loud,* 111 Mich. 156 (69 N. W. 231), the language complained of was "a clear preponderance of evidence." In *Worden Lumber, etc., Co.* v. *Railway Co.,* 168 Mich. 74 (133 N. W. 949), the jury were told that "plaintiff must establish by a preponderance of evidence clear and well defined." In *Silverstone* v. *Assurance Corporation,* 176 Mich. 525 (142 N. W. 776), the objectionable language was "proof which clearly convinces." In all of these cases the language was held to be objectionable, on the ground that the jury might have been misled into believing that it required something more than a preponderance of the evidence to establish the fact. It is carrying the refinement too far, we think, to say that the jury in this case were misled into a similar belief by the use of the word "fair." While it is true that there is a slight shade of difference between "preponderance" and a "fair preponderance," the qualification is so slight that

Digitized by Google

we can hardly presume that the average jury could be misled by it. It undoubtedly would have been better had the qualifying word been omitted, but we are not prepared to say that in this case it was serious enough to call for a reversal.

We find nothing in the remaining assignments which calls for a further consideration of the case.

The judgment of the trial court is affirmed.

BROOKE, C. J., and KUHN, STONE, OSTRANDER, MOORE, and STEERE, JJ., concurred.

The late Justice MCALVAY took no part in this decision.

ON REHEARING.

BIRD, J. Upon the rehearing in this case, counsel for defendants questioned the rule laid down by this court for the submission of special questions to the jury. In holding that the trial court was not in error in refusing to submit the proffered questions, it was said in the opinion:

"Neither question, standing by itself, calls for an answer which would have been controlling. Under the statute which allows the submission of special questions they must be so framed as to call for an answer which may be controlling of the main issue."

We were persuaded by the discussion had upon the rehearing that this construction given the statute (3 Comp. Laws, § 10237) was rather too restricted. While no express construction of this phase of the statute appears to have been made by this court, we are of the opinion that if the questions proposed, taken singly or as a whole, call for findings which might be controlling of the main issue, they should be submitted by the trial court. The questions in controversy, which are set out in the opinion, taken together, come

Digitized by Google

within this rule, and therefore should have been submitted. The statute appears to be mandatory that questions shall be submitted if proper in form and substance. *Zucker* v. *Karpeles*, 88 Mich. 413 (50 N. W. 373). For this error the judgment must be set aside and a new trial granted.

Inasmuch as the case must go back for retrial, another question will be adverted to. The files and judgment entry of a former judgment in ejectment between the same parties with reference to the same premises were received in evidence and read to the jury, over defendants' objection. Their admission was urged upon the ground that they showed the bad faith of the defendant Wright in claiming that her grantor had title by adverse possession, because she had not made that claim on the former trial, and for the further reason that it was a link in the chain of plaintiff's title. As bearing upon the good faith of the defendant, we see no objection to plaintiff showing by the pleadings or by the cross-examination of defendant that she did not make that claim on the former trial, but we doubt the propriety of permitting the judgment to be read to the jury. The jury should not be advised what the outcome of a former trial was, unless some good reason exists therefor, and none is apparent here. The record of the judgment was not competent on the other ground assigned, because a single judgment in ejectment is not necessarily final. *Rice* v. *Auditor General*, 30 Mich. 12.

Defendants will recover their costs in this court.

BROOKE, C. J., and PERSON, KUHN, STONE, OSTRANDER, MOORE, and STEERE, JJ., concurred.

Digitized by Google

BAKER *v.* KAMANTOWSKY.

1. SALES—EVIDENCE—INSPECTION—OFFICIAL ACTS.
In an action for the conversion of a quantity of pork which defendant claimed had soured or spoiled and consequently deteriorated in value, evidence that the municipal inspector had inspected it three days after the delivery and condemned a portion was inadmissible, though the court properly allowed testimony to be received that it smelled bad and was in poor condition.

2. TRIAL—APPEAL AND ERROR—JURY—ARGUMENT.
Counsel's statement, in the course of arguing the cause to the jury, in an action for the conversion of certain meat, that in the sale of an article of food, a warranty was implied by the law that the article was fit for the purpose for which it was sold, was inapplicable, and where the court so advised the jury, the appellant was not prejudiced by the ruling, on the ground that he should have been permitted to state his theory to the jury, the rule of law having no proper application to the issues unless it related to defendant's contention that he had purchased the pork of a wholesale dealer in meat, in which event the rule of *caveat emptor* would apply as the testimony was undisputed that he was not a consumer but a retail dealer, and had an opportunity to inspect.

3. SAME—CAVEAT EMPTOR—SALES—WARRANTY.
Upon the sale of food by one dealer to another with full opportunity to make an inspection, the law does not imply a warranty of fitness or quality.

Error to Kent; Connine, J., presiding. Submitted January 26, 1915. (Docket No. 63.) Decided December 21, 1915.

Trover by Volney Baker against Joseph Kamantowski for conversion of a quantity of pork. Judgment for plaintiff. Defendant brings error. Affirmed.

Digitized by Google

Don E. Minor, for appellant.

Rodgers & Rodgers, for appellee.

BIRD, J. Plaintiff, a farmer, contracted in the fall of 1913 to sell his dressed pork for 10 cents per pound to one Katz, a retail meat dealer in the city of Grand Rapids. A few days after Thanksgiving he killed the hogs, and on the following day delivered them to Katz; but he refused to accept them by reason of the fact that some of them had begun to sour. Plaintiff thereupon placed the pork in the refrigerator of Swift & Co., who were wholesale meat dealers. The understanding under which they were left there is in dispute. Plaintiff returned in a few days thereafter, and found that the hogs had been sold to the defendant, a retail meat dealer, by Swift & Co. He went to defendant's market and demanded payment, and afterwards demanded the pork. Both demands were refused, and he brought this suit in trover to recover their value. The defendant took the position that he purchased the pork of Swift & Co. for 9½ cents per pound; that upon delivery he discovered that some of the hogs had commenced to sour, and he called Swift & Co.'s attention to it, whereupon the consideration was reduced to 5 cents per pound. This amount defendant was willing to pay. Plaintiff insisted that the hogs were sold without his knowledge, and that he had never authorized Swift & Co. as his agent to sell the pork; that he had simply placed it in their refrigerator in an attempt to overcome the sourness. The trial court left it to the jury to determine which of these two conflicting claims was the true one. They found for the plaintiff on the basis of 9½ cents a pound for the pork.

1. The defendant called the meat inspector, the driver of the garbage wagon, and the city inspector of the city of Grand Rapids, and attempted to show

Digitized by Google

by them that the meat was inspected three days after it was delivered to defendant, and that some of it was condemned and destroyed. The trial court refused to receive this testimony, and defendant argues that its rejection was error. The important thing to be shown was its condition, as bearing upon its value. The trial court permitted these officials to testify as to the condition of the meat, and how it smelled. What official action was taken by them under the ordinance based upon this inspection was not important in this case under the issues as made.

2. While defendant's counsel was addressing the jury, the following colloquy took place:

"*Mr. Rodgers:* I desire to object to the statement of counsel for the defendant, as just made to the jury, that there is an implied warranty of the pork in question.

"*Mr. Minor:* I have just stated to the jury what I understand the rule of law to be.

"*The Court:* I heard the statement.

"*Mr. Minor:* I want to get it on the record, your honor; if he wants his objection on there, I want it full.

"*The Court:* All right.

"*Mr. Minor:* That in the sale of an article of food, known to be used or going to be used for that purpose, there is an implied warranty that the article is fit for the purpose for which it was sold or intended to be used.

"*Mr. Rodgers:* I desire to object to that statement, and ask the court to tell the jury not to consider it.

"*The Court:* Well, speaking generally, that is the law; but I do not think that doctrine applies to the facts in this case.

"*Mr. Minor:* I take an exception.

"*The Court:* And it is an error to argue it to the jury."

Counsel assigns error because he was not permitted to "state to the jury what he understood the law to be as applied to the facts." The record shows that

Digitized by Google

counsel did state his theory of the law to the jury, but the court said to them that the rule stated did not apply to the facts in the case. It is quite evident that the court would not have made the ruling at that time, had not counsel invited him to do so by restating his theory and indicating a desire to make a record of it. Counsel also takes issue with the trial court as to the applicability of the law to the facts. It appears to us that the court was right in stating that such rule of law did not apply to the facts. The only application that principle could have would be under defendant's theory; that theory was that Swift & Co., a wholesale dealer in meats, had sold the hogs to a retail meat dealer. This would be a sale by one dealer to another, and not a sale to a consumer. Under such circumstances the rule of *caveat emptor* applies, if the purchaser had an opportunity to inspect the meat, which he did in this case. *Hoover* v. *Peters*, 18 Mich. 51; *Copas* v. *Provision Co.*, 73 Mich. 541 (41 N. W. 690). See, also, Uniform Sales Law, § 15 (Act No. 100, Pub. Acts 1913).

We feel that a further consideration of the numerous assignments is unnecessary. We have given them careful attention, and they appear to be without merit. An examination of the record and briefs impresses us that the large number of assignments is principally due to the failure of defendant to recognize that plaintiff had his theory of the case, and had a right to have it submitted to the jury on his theory. It was conceded that the hogs belonged to the plaintiff, and it was likewise conceded that the defendant had the hogs and had not paid for them. If plaintiff's claim were true, that Swift & Co. had no authority to sell the hogs to defendant, he was entitled to recover from defendant the value of the hogs at the time when they came into his possession; and this would be true, even though Swift & Co. assumed to have the authority to sell the

Digitized by Google

hogs and did sell them to the defendant. On the other hand, if plaintiff authorized Swift & Co. to dispose of the pork, and in pursuance of this authority it afterwards sold it to the defendant, the plaintiff would be bound by such sale. The trial court, in a very excellent charge, submitted these two conflicting theories to the jury, and they have found for the plaintiff, and their determination must be conclusive of the questions of fact.

The judgment is affirmed.

BROOKE, C. J., and KUHN, STONE, OSTRANDER, MOORE, and STEERE, JJ., concurred.

The late Justice MCALVAY took no part in this decision.

PURDY v. CITY OF SAULT STE. MARIE.

1. MUNICIPAL CORPORATIONS—CITIES—WORKMEN'S COMPENSATION—REPEAL OF CHARTER.

It is provided by Act No. 10, Extra Session 1912, that cities shall be subject to the regulations as to workmen's compensation, and that all acts and parts of acts inconsistent with the statute are repealed. The city of Sault Ste. Marie is governed by and under a charter enacted by the legislature which contains no provision for the payment of claims of such character. In the title to the workmen's compensation law it is indicated that liability of employers for injuries to their employees is included. *Held*, that the title, though general, is sufficient to include municipal

Digitized by Google

corporations if they are employers, and that defendant might lawfully provide funds for the payment of awards.

2. SAME—POWERS OF CITIES.

Held, further, that the title of the statute is sufficient to warrant the repeal of charter regulations in existence at the time the statute went into force.

3. SAME—WRITTEN NOTICE—MASTER AND SERVANT.

Under section 18 of the act containing provisions that want of notice in writing shall not bar the proceeding for an award if the employer had notice in fact, testimony showing that the superintendent of public works knew of the accident within a few days, that he brought the claim to the attention of the board of public works, and various city officers knew of the accident, sufficiently met the requirements, and, on giving written notice and bringing his claim to the attention of the city within six months, he was entitled to the benefit of the law.

Certiorari to the Industrial Accident Board. Submitted April 14, 1915. (Docket No. 93.) Decided December 21, 1915.

William Purdy presented his claim for compensation under the workmen's compensation act for injuries sustained as an employee of the city of Sault St. Marie. An order was entered awarding compensation. The award is reviewed by the said city on certiorari. Affirmed.

Lawson C. Holden and *John A. McMahon*, for claimant.

F. T. McDonald, for defendant.

OSTRANDER, J. The claimant, Purdy, was employed by the city of Sault Ste. Marie as a street sweeper. He was run down and injured by a conveyance using the street. An award by arbitrators, approved by the Industrial Accident Board, is questioned in this proceeding, the contentions of the city being:

Digitized by Google

"I. Act No. 10, Pub. Acts 1912, Extra Session, does not apply to municipalities, and appellant is not subject to its provisions.

"II. Said Act No. 10 is compulsory as applied to municipalities and therefore in violation of article II section 1 of the Constitution of Michigan.

"III. To compel payment of compensation under said act would deprive appellant of its property without due process of law.

"IV. Said act makes municipalities insurers of its employees and compels payment of compensation whether or not the injury is the result of any negligence on the part of the municipality.

"V. The legislature is without constitutional power to enact such a compensation act as applying to municipalities.

"VI. The award cannot be sustained because no claim for compensation or notice of injury was presented to or filed with the appellant as required by Act No. 10, Pub. Acts 1912."

In argument it is said that the city is governed by a charter granted by the legislature, and, pointing out its provisions relating to the presenting, allowance and payment of claims against it, no authority is to be found for the payment of the award; that the compensation act, so called, contains no provision for paying the award; that the title to the said compensation act does not give notice of any intention to supersede the charter.

In *Wood* v. *City of Detroit, ante,* 547 (155 N. W. 592), decided herewith, this point was not presented, and is not referred to in the opinion. However, in considering that case we had the advantage of the briefs in the case at bar and are of opinion that the charter provisions of cities with respect to claims which may be made under the act here in question are superseded by the provisions of the act. Section 5 of part 6 of that act expressly repeals "all acts and parts of acts inconsistent with the act" and "replaced by this

Digitized by Google

act." The title of the act mentions and indicates that its provisions relate to "liability of employers for injuries or death sustained by their employees." It is general, as titles of acts must be, and is broad enough to include municipal corporations if they are employers. Our view of the act, as expressed in the opinion in *Wood* v. *City of Detroit*, answers the contention that the plaintiff in certiorari may not provide the funds necessary to pay awards made under the act. The other points, except the last, are answered in the earlier opinion.

Upon the last point we have reviewed the testimony. The claimant was hired by Patrick Brady, who was superintendent of public works of the city. He had charge of work on streets. Mr. Brady saw claimant the second or third day after the injury at the hospital and was told by claimant that while sweeping the street a "rig" ran over him. Mr. Brady mentioned the matter to the board of public works, consisting of the mayor and two members appointed by the council, and in a general way the matter was discussed. An alderman of the city heard of the injury, called at claimant's house and told claimant he would take the matter up with the council. He referred to the case in the council, but made no motion. The first written notice of a claim for compensation was addressed to Mr. Brady as "City Commissioner," is dated April 22, 1913, was served upon Mr. Brady on or about that date, and recites that the injury occurred September 25, 1912. It was brought into the office of the city recorder by some woman May 5, 1913, and left there without any oral statement. It was laid before the council the evening of that day and referred to the city attorney for a report. On May 19th the attorney filed his report. It is conceded that he reported nonliability of the city. Later, on December 1, 1913, a copy of a notice of application to the Industrial Accident Board

Digitized by Google

was served upon the city. Objec
by the city before the arbitration
trating the claim. Upon an app
of the committee the board, upon
testimony and the objections there
affirmed the award. To the arbitr
city objected to the arbitration "
no notice of injury was served on'
disposed of the point, as appears b
in the following manner:

"The act in question provides fo
upon the city within three months
of the injury, and notice of a clain
the act within six months after d
of physical or mental incapacity.
act provides: 'Want of written n
bar to proceedings under this act,
the employer had notice or knowl
The testimony discloses that the ci
bers of the common council genera
injury, in ample time. That no
officially served upon them until
of three months must, I think,
from the evidence. However, the
to prevent fraud and to permit
to collect its evidence before the p
edge of the same are scattered and
I think that it has been sufficien
city, in its official capacity, and n
officers (including the board of
knowledge of the injury, and mo
consultation and conferences had
lieve this notice to be sufficient.
was filed, or left with the recorde
from the date of the injury."

Upon the subject of notice of i
part II, provides:

"Sec. 15. No proceedings for c
injury under this act shall be n

Digitized by Google

notice of the injury shall have been given to the employer three months after the happening thereof, and unless the claim for compensation with respect to such injury shall have been made within six months after the occurrence of the same; or, in case of the death of the employee, or in the event of his physical or mental incapacity, within six months after death or the removal of such physical or mental incapacity.

"Sec. 16. The said notice shall be in writing, and shall state in ordinary language the time, place and cause of the injury; and shall be signed by the person injured, or by a person in his behalf, or, in the event of his death, by his dependents or by a person in their behalf.

"Sec. 17. The notice shall be served upon the employer or an agent thereof. Such service may be made by delivering said notice to the person on whom it is to be served, or leaving it at his residence or place of business, or by sending it by registered mail addressed to the person or corporation on whom it is to be served, at his last known residence or place of business.

"Sec. 18. A notice given under the provisions of this act shall not be held invalid or insufficient by reason of any inaccuracy in stating the time, place or cause of the injury, unless it is shown that it was the intention to mislead, and the employer, or the insurance company carrying such risk, or the commissioner of insurance, as the case may be, was in fact misled thereby. Want of such written notice shall not be a bar to proceedings under this act, if it be shown that the employer had notice or knowledge of the injury."

The notice referred to in section 16 is, clearly, the notice required by section 15 to be given. The word "within" must be supplied in section 15, making the section read:

"Unless a written notice of the injury shall have been given to the employer within three months after the happening thereof."

No such notice was given. It is apparent, however, that the employer had notice and knowledge of the injury within the shortest period named in the act and, giving effect to section 18 in accord with the evi-

Digitized by Google

dent legislative intent, the claimant was not barred this proceeding.

It follows that there is no error, and that the award must be affirmed.

BROOKE, C. J., and KUHN, STONE, BIRD, MOORE, and STEERE, JJ., concurred.

The late Justice MCALVAY took no part in this decision.

STROH v. BAUMAN.

APPEAL AND ERROR—SUBROGATION.

Defendant appealed from the decree of the circuit court in chancery entered after the cause had been remanded for modification of the decree settling the affairs of an estate following an appeal to the Supreme Court. He claimed that he was charged with $377.74 for the benefit of complainant that was no proper obligation of and in no way related to the affairs of the estate; that the money was an advance by complainant for his personal benefit, in the adjustment of a private timber purchase and other similar deals. The decree entered on the first appeal contained the provision that complainant and appellant were entitled to liens on the property in question to the amounts of their respective contributions and that the parties should be entitled to be subrogated to the rights of creditors of the estate having liens upon the real property in question. And the final order provided that if it should appear that any part of the contributions of either party was not contributed for the benefit of the estate the court might make deductions and compute the proportions accordingly. The final decree was entered in the circuit court without making deductions and computing propor-

Digitized by Google

tions, as ordered by the appellate court, and it is *held* that the decree should be modified to conform to the former holding of this court, and a deduction be made under the unconflicting testimony from the amount to be credited to complainant.

Appeal from Ottawa; Cross, J. Submitted April 14, 1915. (Docket No. 83.) Decided December 21, 1915.

Bill by Conrad Stroh against Joseph Bauman and others to be subrogated to the rights of mortgagee on property of the estate of Dominic O'Hearn. From a decree for complainant defendant Bauman appeals. Modified.

Farr, Kolyn & Farr and *Smedley & Linsey*, for complainant.

Charles E. Soule (*C. Edward Soule*, of counsel), for defendant Bauman.

Hatch & Raymond, for other defendants.

STONE, J. This is the second appeal in this case. Upon the first appeal the opinion was written by Chief Justice STEERE, and is reported in 176 Mich. 164 (142 N. W. 865). That opinion contains such a full and clear statement of the case and the position and rights of the parties, that it will be only necessary to here say briefly that Dominic O'Hearn died testate on September 7, 1898, owning a farm of 180 acres of land in Ottawa county. By his last will and testament he gave and devised all his property, real and personal, except a span of horses, to his wife, Margaret O'Hearn, for life, and after her death the 120 acres south and west of the State road to his son John O'Hearn for life, and the 60 acres north and east of said road to his son Martin O'Hearn for life, and after their death to their heirs; also legacies of $500 each to his daugh-

Digitized by Google

ters Minnie and Agnes, and $1 each to his dau
Lizzie and Maria, "to be paid from the proce
the farm as soon as it will admit, or at the plea
my wife, Margaret O'Hearn, should she survi
long, but in no case shall a payment be put off
ceed the term of five years." For money to p
debts and expenses of administration, mortgage
given by the administrator by authority of the p
court to Charles E. Chappell, $1,000 on the 6(
willed to Martin O'Hearn, and $1,050 on 80 a
the land willed to John O'Hearn. The admini
de bonis non, having obtained license therefor,
strip of land 3 rods wide from the 60 acres nor
east of the State road and adjacent to it to an
urban railway for $150, and to Frank O'He
acres of the 120 which had been willed to John O
for life. Interest was not paid on the mortgag
foreclosure was had in chancery, and a decree ta
Mr. Chappell, acting by the same solicitor who
sented the complainant in this case. The 60
acres were likely to be sold on the foreclosure,
would close out the devisees of the land and t
acies. The legatee Minnie was the wife of con
ant, Stroh. Defendant Bauman, a neighbor, ha
solicited to buy the 60 acres. It was talked o
tween Stroh, John and Martin O'Hearn, and B
that the latter should buy the 60 acres from M
pay $2,200 for it on the mortgages, and Stroh
take a mortgage for $1,300 on John's remain
acres and pay the rest of the mortgages and le
and John was to deed one-half of the 80 acres t
tin to compensate him for his deeding the 60 a
Bauman to pay the mortgages. After this tal
met at Mr. Farr's office (Chappell's solicitc
March 19, 1904, at which meeting Martin O
and wife deeded the 60 acres to Mr. Bauman b
ranty deed, which amount, $2,200, Mr. Baum

Digitized by Google

cured Chappell on his mortgages. John deeded the undivided one-half of the 80 acres to Martin, and they two made a mortgage to Mr. Stroh for $1,300. Stroh paid the balance of the mortgages to Chappell, he paying $245.26, making the total amount of the mortgages $2,445.26. (The opinion gives this amount as $2,309.99, and in settlement of the decree it was made $2,445.26 on account of interest being added, $3,425.26 being the amount given, with $2 added for legacies paid by Stroh.) Stroh paid the two $500 legacies to his wife and her sister, and $1 each to the other sisters, making $1,002 paid by him of the legacies, instead of $1,000, as stated in our decision.

All parties to this transaction acted in the honest belief that Martin and John O'Hearn were devised the land in fee. Stroh also paid at this meeting in Farr's office $30 to Mr. Farr and the rest of the money, making his $1,300 mortgage to Martin O'Hearn; in other words, he paid the balance of the mortgage to Chappell, $245.26; he paid the legacies, and paid Mr. Farr $30 and Martin O'Hearn $22.74. This makes paid by Bauman to Chappell for the 60 acres $2,200, and by Stroh to Chappell on mortgages $245.26, and by Stroh on legacies $1,002—total, $3,447.26—which is the amount decreed by the circuit court as paid on the valid liens against the estate.

The decree as settled in this court upon the former appeal contains the following recital:

"And it further appearing that on the 19th day of March, 1904, said complainant, Conrad Stroh, contributed the sum of $1,625 and defendant Joseph Bauman contributed the sum of $2,200 to the fund of $3,825, of which fund $3,445.26 was apparently applied in liquidation of valid liens against the said estate of Dominic O'Hearn, deceased, and that the said Conrad Stroh and Joseph Bauman became secured creditors of said estate to the amount of said liens, and that they are now entitled to liens against said estate in

Digitized by Google

proportion to their respective contributions thereto as hereinafter set forth."

The decree also contained the following provision:

"That for the purpose of a determination of the respective amounts of the liens of Conrad Stroh and Joseph Bauman, this cause may be placed on the calendar of the Ottawa circuit court, in chancery, for the November, 1913, or any subsequent term thereof, upon giving the usual notice of hearing required by the rules and practice of said circuit court, and said court shall, in such proceeding, determine the amount of the respective liens of said parties, said Conrad Stroh and Joseph Bauman to be entitled to a lien to the amount of their respective contributions to said fund of $3,445.26 in proportion to the contributions to the fund of $3,825, of which said Joseph Bauman contributed $2,200 and the said Conrad Stroh contributed $1,625, subject to the following increases and deductions; that in the determination of said liens said court shall allow interest to said parties at the rates borne by the mortgages to which they are subrogated, and at the legal rates as to the legacies, from March 19, 1904, upon the amount of their proportionate contributions to said fund of $3,445.26; provided, however, that if it shall be made to satisfactorily appear that any part of said contribution of either of said parties was not contributed for the benefit of said estate, the court may make deductions and compute the proportions accordingly."

Upon the final hearing in the circuit court under the above reference and from which decree this appeal is taken, a controversy arose as to the amount which was contributed by the complainant for the benefit of the said estate. The supposed facts upon which the decree of this court is based with regard to a "fund" of $3,825, to which Mr. Bauman is held to contribute to Mr. Stroh's benefit beyond the $2,200 paid for the 60 acres and in payment of the obligations of the estate, are found in certain allegations in the original bill of complaint, and in the answer thereto, and in the stipulation filed upon the original hearing in the case. Upon

Digitized by Google

these supposed facts the decision and the decree of this court were made. By the decree from which this appeal is taken Mr. Bauman is held to contribute to Mr. Stroh a proportion of his payment, he paying $2,200 and Mr. Stroh $1,247.26 on the actual obligations of the estate, on the $3,825 "fund," made up of the $3,447.26 paid on the estate obligations and the $325 paid by Stroh for the timber deed from Martin and John O'Hearn, and $30 paid by him to Mr. Farr, and $22.74 paid by him to Martin O'Hearn, which, it is the claim of Mr. Bauman, were Stroh's own private deals with the parties, and not paid on the obligations of the estate in the total amount of $377.74. This brings us to the one matter contained in this appeal. The record states Mr. Bauman appeals only on matters decided in the final decree as follows:

(1) "From the combining of the $1,002 contributed by Stroh for the payment of legacies, on which the interest rate is 5 per cent., with the $2,200 contributed by Bauman and the $245.26 contributed by Stroh for the payment of the Chappell mortgages, on which the interest rate is 6 per cent. This combination benefits Stroh to the extent of more than $100 in interest, and deprives Bauman of same, which is contrary to the Supreme Court decree as to interest rates on the respective contributions of said parties."

(2) "From including in the amount to which Stroh is subrogated the $325 paid by Stroh for the timber deed; the $30 paid by Stroh to Mr. Farr for drawing papers; the $22.74 balance paid by Stroh to Martin O'Hearn. These amounts aggregate $377.74, which, with interest for ten years, is credited to Stroh and taken from Bauman contrary to the Supreme Court decree, none of said payments having been made for obligations of the Dominic O'Hearn estate."

Some incongruities or inconsistent clauses are to be found in the pleadings and stipulations of the parties and the finding by this court with reference to the "fund" of $3,825. It should be borne in mind that,

Digitized by Google

when the original bill was filed in this case, the object was to subrogate Mr. Stroh and Mr. Bauman to rights which it was claimed they had obtained by reason of paying the mortgages and the legacies which were a lien upon the estate of Dominic O'Hearn, deceased, and there was no conflict between them. In that bill Mr. Bauman is made a defendant; and, after alleging the payments of the mortgages and legacies, the fourteenth paragraph of the bill reads as follows:

"And your orator further says that thereupon the said sum of $2,200 so paid by the said Joseph Bauman and the said sum of $1,300 and $325 so paid by your orator were used and expended in the payment of said two mortgages and notes so given to the said Charles E. Chappell, and in the payment of the said legacies to the said four daughters of the said John (Dominic) O'Hearn, amounting to the sum of $1,002."

While by the decree of the court below, from which this appeal is taken, it is found, as a fact, that the liens which were paid were $3,447.26, consisting of the mortgages, with interest and costs, of $2,445.26, and legacies of the sum of $1,002, which were used for the purpose of discharging valid liens and claims against said estate, and that said Stroh and Bauman are entitled to a lien on the proceeds of the sale of the real estate belonging to said estate for that sum, yet by reason of including the $325 of the timber deal and other items which were not a lien upon the estate the so-called "fund" of $3,825 is created.

It is true that the bill alleges that at the meeting on the 19th day of March, 1904, the arrangement was made by which Martin O'Hearn was to convey to Bauman the premises devised to him in said will for the sum of $2,200 and the timber upon a portion of said premises to "your orator" for the sum of $350, etc., and the answer of Bauman admits the correctness of this allegation. Again, the fourteenth paragraph of

Digitized by Google

the original bill, which we have above quoted, is also admitted by Bauman to be true; and yet it nowhere appears in this record that the $325 paid by Stroh in the timber deal and the other items named were ever a lien against the estate of Dominic O'Hearn. Upon the original hearing of the case a stipulation was filed containing substantially the same statement. Upon turning, however, to the opinion of this court, we find it was distinctly held that the timber deed to Stroh made by John and Martin O'Hearn authorized waste of the fee, and was invalid. Turning to the proceedings upon the original hearing in the circuit court we find the following:

"*The Court:* That timber deal, as I understand you to say, that didn't amount to anything, anyway?

"*Mr. Farr:* No; that didn't amount to anything.

* * *

"*Mr. Farr:* The point is this, as I have always looked at it, of course, there could be no subrogation in this case except as to money that was used to pay the debts of the estate, and those debts, so far as they are in proof here, as I understand as paid, was this Chappell mortgage and these legacies. I don't claim anything more than that, because I don't think we have any proof of any."

Upon the original hearing the matters that seemed to be most in controversy were the amount of improvements which had been made upon the premises by Mr. Bauman and the value of the use of the premises, and the amount paid for taxes. Upon settlement of the decree in this court the following clause was inserted upon the motion of counsel for defendant Bauman, to wit:

"Provided, however, that if it shall be made to satisfactorily appear that any part of said contribution of either of said parties was not contributed for the benefit of said estate, the court may make deductions and compute the proportions accordingly."

Digitized by Google

The case having gone back to be heard upon matters, it appears by the uncontradicted test of both Stroh and Bauman that the $325 had n to do with the liens against the estate of D O'Hearn. Upon that subject Stroh testified, a other things, as follows:

"I recollect the conference at Mr. Farr's office 19, 1904; was present at it. We were trying to the estate and straighten out the 80 and 60 with and Martin O'Hearn. I recollect how it was s I furnished $1,300, and Bauman $2,200. I got a gage for my $1,300 from John and Martin O'H No other money was raised at that time. I d contribute anything more at that time. John O' sold timber to Adams of Grand Rapids before we this deal. I paid Adams and Hart and took a s mortgage on the place signed by John and M O'Hearn together. That was not discussed a meeting at Farr's office. That was made about or so afterwards, I believe. I can't tell exactly it was. I believe it was discussed at Farr's off don't understand that it was a part of the fun we were raising there. I don't think we talked it then. I don't remember if we did. I don't rem exactly that it was talked there that they had a t deed on that property. I think it was a year later when we talked the timber deed over. * There was no money raised at that time. That was not paid to anybody at that time. I paid Adams and Hart, of Grand Rapids, implement d there, but it is all recorded. I don't know just it happened. I ain't certain that that $325 was of the discussion in Farr's office when the othe was fixed up. I know we fixed it up afterwa don't know how long. I let them have the $325.'

On cross-examination he testified:

"I don't remember if we talked over raisin $325 at the meeting at Farr's office March 19, I don't remember if we talked about it; we might I don't remember whether the $325 for the t deed, in order to clear the item which Hart and A had against it, was talked over and considered

Digitized by Google

at this transaction of March 19, 1904. I don't think it was a mortgage of $325. I think I furnished a little more money. I can't tell what the mortgage was now. What I took for the $325 was timber deed signed by John and Martin and Martin's wife. It is on record here. I don't think there was a mortgage for $325. * * * I paid at the conference at Farr's office $1,002 legacies—$500 to one daughter, my wife; $500 to Agnes, another daughter; and $1 each to the two other daughters. Whatever was due to Dr. Chappell was paid; I don't remember how much. Bauman paid just about $2,200. I paid the rest. Whatever it was we paid and settled it that way. They settled it up, paying the debts against the old man O'Hearn estate and legacies. The $325 timber deal was a matter I settled for John O'Hearn. He had that money from Adams and Hart. That was not paid on any of the debts of the estate, but John sold the timber and gave Adams and Hart a timber deed. I paid Adams and Hart the money, and they turned the timber deed over to me, and later I took a mortgage from John [and] Martin for $600, and gave up the timber deed, and I paid them some money, whatever that figured up, interest and all. There was nothing in the timber deed except John had the money from Adams and Hart and I took it up. I think they owed some debt there. The Mrs. [Margaret O'Hearn] was alive then. I think they owed probably $100 or $200, and Adams and Hart gave them the balance in money. They owed for a horse or tools, or something like that. It was not the old man O'Hearn's debt at all; it was a debt on the O'Hearn estate is all."

Mr. Bauman testified to substantially the same state of facts, and later Mr. Stroh was recalled, and testified further as follows:

"I heard Bauman just testify as to what his understanding was with reference to the meeting at Mr. Farr's office in 1904. That is my understanding of it. My understanding is that we were together to raise the money to take care of the obligations of the estate —the two legacies and the mortgages."

It will be observed that there was no conflict in the testimony of these parties with reference to this mat-

Digitized by Google

ter. The facts are shown clearly that at the meeting at Mr. Farr's office there was no "fund" of $3,825 raised at all; that the "timber deed" was not considered, but was an after consideration and a deal between Mr. Stroh and John and Martin O'Hearn, in which Mr. Bauman had no interest; that deed bore date March 22, 1904, and was acknowledged March 26, 1904; that $2,200 was paid by Bauman and $245.26 by Stroh on the mortgages, and the $1,002 was paid by Stroh for the legacies, making a total of $3,447.26 which was paid on the obligations of the estate, and that amount only. The $30 paid to Mr. Farr, the $22.74 paid to Martin O'Hearn, and $325 for the timber deed paid by Stroh—total, $377.74—were paid by Stroh in his private deals, and are not a part of any valid claims against the estate.

The court below, after hearing this testimony, did find, as we have above stated, that the amount paid on the liens was $3,447.26 as valid liens against said estate; and it must be said that this is the equivalent of finding that no more was paid as valid liens and claims against said estate; and yet, losing sight of the provision in the decree as settled by this court, and instead of giving Mr. Bauman 6 per cent. on the mortgages paid by him to which he is subrogated as provided in the decree, and Mr. Stroh 5 per cent. on his legacies paid, the amount paid on the mortgages, $2,445.26, and $1,002 on the legacies are figured at 6 and 5 per cent. to March 30, 1914, the date of the decree, and bunched together into one sum of $5,421.38, and Mr. Stroh is given 1625/3825 and Mr. Bauman 2200/3825 of same, being $2,303.21 and $3,118.17, respectively. This error takes away from Mr. Bauman and gives to Stroh $57.24 from the 6 per cent. interest which Mr. Bauman is entitled to on the mortgage to which he is subrogated. Instead of making deductions and computing proportions as required by the decree of

Digitized by Google

this court, and as shown by the uncontradicted evidence that the $377.74 paid by Stroh to make the $3,825 was not paid for the benefit of the estate, the provision in the decree of this court is disregarded as though this proviso was not contained therein. By this computation Mr. Bauman is compelled to lose, and his money is given to Stroh in the sum of $348.02, making, with the $57.24 in the error in interest, $405.26. It is for the correction of this error that Mr. Bauman has appealed.

It seems to us, upon an examination of this entire record, that the learned trial judge did not "make deductions and compute proportions accordingly," as directed in our decree, but the computation is made as though no such provision was contained in the decree. This computation takes nothing from the O'Hearn estate in addition to the circuit court decree. It takes that amount of money ($405.26) from Mr. Stroh and gives it to Mr. Bauman. The amount, therefore, to be deducted from Mr. Stroh's final credit and added to Mr. Bauman's final credit, should be the sum of $405.26.

The decree of the court below will be so modified, and in all other respects will stand affirmed. The defendant Bauman will recover his costs in this court from the complainant.

BROOKE, C. J., and KUHN, OSTRANDER, BIRD, MOORE, and STEERE, JJ., concurred.

This case was originally assigned to the late Justice MCALVAY.

Digitized by Google

BURNS v. ESTATE OF READING.

1. COMPROMISE AND SETTLEMENT—RELEASE—RATIFICATION—FRAUD.
In proceedings against a decedent's estate to secure compensation for personal injuries, defendant estate claimed that the injured employee had accepted $250 in full settlement and satisfaction, and had executed a release under seal for his broken leg. The limb, failing to knit, claimant attempted to repudiate the settlement and recover for his injury, which resulted in amputation, charging the physicians with fraudulently misrepresenting to claimant his true condition. He made no complaint of the alleged fraud during upwards of twenty months after the date of the release. Claimant was advised of the falsity of this alleged medical advice within a few days after his executing the release, when his leg was amputated. Another writing was executed by claimant within a few weeks of the injury, and just before the operation, referring to the compromise and expressly confirming it. Claimant was over 40 years old. He could read and write and was intelligent. *Held*, that he had ratified the release by long acquiescence and could not repudiate it for fraud after so long a period.

2. SAME—RATIFICATION—DELAY.
One who seeks to rescind a compromise for fraud must act promptly after discovering the wrong and must return the consideration received in full.

Error to Wayne; Codd, J. Submitted June 8, 1915. (Docket No. 16.) Decided December 21, 1915.

Fred Burns presented his claim against the estate of Harvey J. Reading, deceased, for personal injuries. From the disallowance of the claim in probate court claimant appealed to the circuit court. Judgment for defendant upon a directed verdict. Claimant brings error. Affirmed.

Digitized by Google

William Jerome Kuertz and *Dohany & Dohany*, for appellant.

Dohany & Hersch and *Allan H. Frazer*, for appellee.

STEERE, J. This case originated in the probate court of Wayne county where appellant, Burns, filed a claim against the estate of Harvey J. Reading for personal injuries sustained on June 1, 1910, while in the employ of Reading, who then was engaged in the trucking business in the city of Detroit and had a warehouse in which goods were at times stored. On the day of the accident a truck driver named Wilson and appellant, Burns, were sent late in the afternoon to haul some old office partitions from Reading's office on Woodbridge street to his warehouse. When they arrived at the warehouse with the load the freight elevator operator at that building had gone home for the day, but Reading was yet there, and under his instructions the partitions were loaded upon the elevator, of which Reading took charge, and started it with the three men on board for the fifth floor of the building, where it was intended to store the material. Just before they reached the fifth floor the elevator cable broke and the loaded cage with the three men in it fell to the ground floor. Burns and Wilson were seriously injured. The record contains no direct statement as to Reading, though it seems inferable that he was then killed or died soon after, as no mention is made of him alive subsequent to the accident, and only his administrator and other representatives of his estate figure in subsequent events. Burns and Wilson were at once taken to Red Cross Hospital, where they received proper care and medical attention. The bones of Burns' left leg were bruised and broken in two places between the knee and ankle. He remained in the hospital until the 6th of January, 1911, over seven months, during which time, after the physicians found the

Digitized by Google

bones of his leg would not knit, and two operations had been performed in an attempt to save the limb, it was finally amputated, on November 11, 1910.

The claim was disallowed in probate court, and an appeal taken by claimant to the circuit court, where upon the trial a verdict was directed for defendant. For appellant it is charged that the accident was occasioned by negligence of Reading in not properly managing the elevator; and particularly in failing to seasonably check it before certain projecting portions of the partitions loaded upon it under his supervision came in contact with the roof of the elevator shaft, causing a sudden and heavy strain upon the cable and breaking it. It is also claimed that the cable was worn, crystallized, and weak, so as not to be sufficiently strong to withstand the extra strain which he put upon it by the negligent manner in which he operated the elevator.

In the circuit court defendant filed a plea of the general issue, with notice of settlement of said claim for $250 and payment of the same to claimant in full on July 26, 1910, by Reading's administrator, which claim was allowed against the estate by the then commissioners on claims, and never appealed, and became absolute long before application for revival of the commission on claims was made and the matter again presented, whereby the same became *res adjudicata*, and that amputation of Burns' limb was made necessary because of a diseased condition of his system continuing from previous to the time of his injury and of which he had full knowledge prior to the amputation, to which he consented, at the same time reaffirming the settlement previously made. The court directed a verdict in favor of defendant at the conclusion of appellant's testimony, on the ground that it conclusively appeared he had settled his claim for all damages against the

Digitized by Google

Reading estate on the 26th day of July, 1910, and was then paid in full according to the terms of said settlement, which he again confirmed in writing and ratified on the 7th day of November, 1910, and, with full knowledge of all the facts, circumstances, and conditions, he had made no complaint, acquiesced in the settlement, and slept upon his rights, if any, taking no steps to rescind for such a period of time that he was barred by delay and laches from prosecuting his claim.

No evidence having been introduced by the defense, only claimant's testimony presenting his side of the case is before the court. As a verdict was directed against him, his evidence is to be considered in its most favorable aspect, and the question is, when so considered: Does it establish *prima facie* a cause of action?

It is shown that a Mr. Hawkins, who had been bookkeeper for Reading, and was appointed administrator of his estate, looked after the two injured men, each of whom had a fractured limb. They were taken to the hospital, where they remained and were cared for with proper nursing and medical attention at defendant's expense so long as their necessities required and until discharged as recovered. Hawkins visited them from time to time, looking after their wants, and showing them various kindly attentions. At about the same time, and before they were discharged, he agreed upon a settlement with each and paid him the agreed amount. Wilson had suffered a broken leg at the ankle, and remained in the hospital two months, as testified by Burns, though other testimony shows a shorter time. For the first two months a Dr. Corville, house physician or surgeon of the hospital, was in charge of Burns' case and his regular attending physician. He was at times assisted by Dr. Schwanz, who after two months assumed full charge. On July 26, 1910, while Dr. Corville was yet in charge, Hawkins and Burns agreed

Digitized by Google

upon a settlement of any claim the latter m
against Reading's estate for the sum of $2
was then paid. Fifty dollars of this Burns s
and the balance he had put in the hospita
him. At the time of this settlement he s
following paper:

"DETROIT, MICHIGAN, July 2(

"Know all men by these presents that I, Fr
of Detroit, Michigan, having been injured b
ing of a freight elevator in the warehouse (
J. Reading, now deceased, at the corner of
Congress streets, in the city of Detroit, o
1910, and having received, since that time
treatment at the Red Cross hospital in Detr
expense of said Reading and his estate, a
made a claim for damages against the esta
Harvey J. Reading, which claim has been
Charles W. Hawkins, administrator of said
consequence whereof a difference has arise
myself and the said administrator respecting
and having, for the purpose of terminating
ference, agreed with the said administrator t
accept the sum of two hundred and fifty ($25
in full satisfaction and settlement of my cl
stated:

"Now, I do hereby acknowledge that I hav
received from said Charles W. Hawkins, admi
the sum of two hundred and fifty ($250) doll
I hereby accept in full settlement of all claim
soever nature that I have had or may hav
the estate of said Harvey J. Reading, dec
reason of the injuries received by me as
or from any other cause, and in considerati
medical treatment and said money I do herel
and discharge the said estate and the said ad
tor thereof from any and all claim, demand
bility whatsoever.

[Signed] "FRED E

The broken bones of Burns' leg refused to
all attempts to save the limb proving uns
after a couple of operations and an X-ray exa

Digitized by Google

it was finally decided by the physician (he then having been in the hospital over five months) that the leg could not be saved, and an amputation was performed, as already stated, on November 11th. Before the amputation Dr. Schwanz, then in charge, discussed the matter fully with Burns, telling him the situation, and that the leg could not be saved, and, after Dr. Corville had also expressed the same view, Burns consented to the operation. Before the operation Dr. Schwanz told him that Hawkins & Harris, defendant's attorneys, had a paper for him to sign, and proposed that they "talk it over *pro* and *con*," suggesting that Burns sign it. The paper was handed to him to read, and he subsequently signed and swore to it. The paper is as follows:

"On this 7th day of November, nineteen hundred and ten, I, Fred Burns, make the following statement of facts:

"*First.* That on June 1, 1910, I received a compound fracture of my left leg, between the knee and ankle joints, in an elevator accident in the warehouse of Harvey J. Reading, now deceased.

"*Second.* That at the direction of said Harvey J. Reading, I was sent to the Red Cross Hospital for medical treatment.

"*Third.* That I have since received medical treatment from said institution, with its physicians in charge, and my limb was treated in the usual manner of fractured limbs expecting that within a reasonable time said limb would be repaired, all the expense of which treatment has been paid or assumed by the administrator of said Reading.

"*Fourth.* That during my treatment at said hospital I made a settlement with the administrator of said Reading estate, and released said estate from all liability to me, which settlement I now confirm.

"*Fifth.* That on or about July 25th the physician in charge, Dr. Charles W. Corville, notified me that the bones were not uniting in the usual manner, and that it would be necessary to perform an operation on the said limb and wire the bones together.

Digitized by Google

"*Sixth.* That after due consultation with physicians in charge, Drs. Chas. W. Corville and M. J. Schwanz, I consented to the operation, that the said bones in my limb be wired together, with the expectation that said operation would result in repairment to said limb, and said operation was performed about August 1, 1910.

"*Seventh.* That on October 1st Drs. M. J. Schwanz and D. H. Newton, after due examination, decided the joints had not united, and in all probability would not unite, on account of the condition of the bone.

"*Eighth.* That said physicians recommended to me that, in order to save my life whole, I consent to an amputation of the fractured limb:

"Now, therefore, in view of all the facts as herein stated, and after due consideration of them in my own mind, I hereby, of my own free will and consent, exonerating all others connected herewith, agree to allow the said physicians to amputate my left leg at or below the knee joint, and that said amputation is made in the interest of preserving my health and life.

"In witness thereof I have hereto set my hand and seal the day and year first above written.

[Signed] "FRED BURNS.

"Witness:

[Signed] "M. J. SCHWANZ."

A jurat attached to this shows that it was sworn to by Burns before William C. Harris, as notary, on November 8, 1910.

These instruments, if voluntarily and understandingly signed, are manifestly binding upon claimant and conclusive. The fact that Hawkins, or defendant's attorney, or any one else solicited or advised him to make the settlement and sign the papers is no ground for repudiating them, unless they induced him to do so by some fraud or misrepresentation. He was then a man over 40 years of age, with a common school education, given to reading, and apparently intelligent. He spent much time reading while in the hospital. He could and did read the release signed by him on July 26th, and testified that he understood every word of

Digitized by Google

it at the time he signed it, but claims he was deceived as to the condition of his leg and the prospect of recovery by Hawkins and Dr. Newton, a physician who was employed by defendant. He does not, however, give any testimony which imputes fraud or deception to the hospital physicians who were in charge of his case. Although he testified that Dr. Corville, who first took charge of the case, told him in reply to his inquiry that it would take the broken limb eight weeks to heal, he also testified that later, when he asked the physician if his leg was healing, he would not answer him.

The circumstances of the alleged misrepresentation and settlement, as told by Burns, are, briefly, as follows: In a talk between him and Hawkins the latter said:

"'Better have two doctors' word than one to find out how the leg was getting along.' He said that I would feel more encouraged to have the word of two than one. He said he would bring the doctor of the Reading estate, Dr. Newton."

That following this talk, and three or four days before the settlement, Hawkins brought Dr. Newton to the hospital. That Dr. Newton made an examination of the leg in the presence of Dr. Corville, and said it "was getting along all right, * * * doing fine; 'massage your leg, and you will be out of here in two weeks,'" which encouraging information he believed. That Hawkins, who was present when Dr. Newton made the examination, came in the next day and they talked of a settlement. Of this he testifies in part:

"That is the first time he or any person representing the Reading Company talked to me about a settlement. He said then that he would like to settle with me because he would like to get me off the books, and he did not like to carry me on, but I would be protected. * * * Mr. Hawkins said he had Dr. Newton's report of the condition of my leg, and it was doing well, and he wanted to settle, and he said that he would

Digitized by Google

like to get me off the books, and I would be pr
And I accepted it. He offered me $250. * *
the time I signed this release I relied upon th
ments of Dr. Newton and Hawkins."

It is not shown that the physicians in charg
case ratified what Dr. Newton said or gave h
reason to think his leg was healing. His ow
mony tends to the contrary. He knew Dr. New
defendant's medical representative and that h
based his representations on Newton's repor
conceding that his claim of reliance upon th
sentations of defendant's physician at the
settlement raised an issue of fraudulent indu
he had full knowledge that such representatio
untrue long before and at the time he signed an
to the second paper of November 7th, shortly
his leg was amputated. His testimony as to t
ond paper, signed without protest over three
after the settlement, and when he knew the fu
ure of the deception he claims was practiced up
is equivocal and peculiar. He at first denied
such a paper, but, on its being shown to him
ted that he did sign and swear to it, and testifie
cumstances, including the manner of administe
oath to him. Requested to read the paper ov
fully and point out anything wrong in it, he
pointing out certain matters in the fifth, six
seventh paragraphs as follows: That Dr. Cor
not notify him the bones were not uniting in th
manner, and that witness did not consent to an
tion after consultation with "physicians in char
Corville and Schwanz," but the operation w
formed after Dr. Schwanz said it must be don
the statement in paragraph 7 was incorrect so f
had knowledge, because Schwanz and Newto
never in consultation in his presence. Havin
pleted his examination of the paper, he was as

Digitized by Google

"*Q.* Is it all right except as you have pointed out?"

And he answered:

"Except as I have pointed out, everything is all right.

"*Q.* The rest is true?

"*A.* Yes. * * *

"*Q.* You confirm the statement in all its particulars, with the exception of those corrections you have made?

"*A.* Yes. * * *

"*Q.* After you have read it over carefully again?

"*A.* Yes."

The following day he modified this by testifying that his attorney had pointed out to him the words "I confirm," which he did not know the meaning of till it was explained to him, and in answer to further inquiry again said he understood all the other words in the paper with the exception of "confirm," and the balance was absolutely true, except the discrepancies he had previously pointed out. He also testified in relation to the execution of this paper that at the time he signed it he was weak and sick, had been suffering pain, at times had been given hypodermics to enable him to sleep, and the idea of having his leg amputated frightened him so that he was not in condition to act and think normally; that the matter was first presented to him by Dr. Schwanz, who said that, as his leg was to be amputated, Mr. Hawkins and Mr. Harris had a paper it was desired he should sign, and the doctor proposed that they "talk it over *pro* and *con*," suggesting that he sign it, and it was handed him to read, and he signed it. The paper particularly makes mention of the previous settlement, as to which he then knew, as well as he ever knew later, whether or not he had been induced by fraud and false representations to enter into and sign the previous release, and he knew the second paper came from the same parties as the first. He offers no proof of any promises, false representations, or inducements by any one as to the

Digitized by Google

second paper. It is difficult to r
his signature to the first was o
deceit with his signing the secon
of the fraud claimed to have b
him on the former occasion, eve
he did not understand the word
inating the portions which he pc

Claimant's evidence shows tha
a few days after this settleme
agreed sum had been paid to hi
tion was yet fresh in his memo
he states Dr. Newton told him
says he relied, was strikingly
the operation in which his leg
bones wired because they had
brought home to him when,
Schwanz, on the day after the
told him his leg had to come of
these facts he not only signed
remained in the hospital for nea
raising any question or making
to the settlement. He testifies th
and Hawkins, with whom he
terms, called upon him occasiona
to the train when he started for
he never made any complaint to
the settlement.

The first knowledge defendant
had that claimant questioned the
in April, 1912, nearly two years
tion in probate court of Wayne
commission on claims followed
the money, with interest, paid at
ment on July 26, 1910. He did
pay the cost of his medical at
expenses which had been paid or
for him.

Digitized by Google

It appears by claimant's testimony that on July 26, 1910, he settled with defendant's representative an unliquidated and disputed claim with a clear understanding of the terms of settlement, and was paid in full the agreed amount, signing a receipt and release of his claim. The contract was executed. His contention now is that it was voidable as to him and he has a right to repudiate and rescind it because he was induced to make the contract by the intentionally false and fraudulent professional opinion or statement of the doctor of the adverse party as to the condition of his leg and prospect of recovery, upon which, as stated to him by the doctor and urged by Hawkins, he relied. Taking his testimony as true, and conceding this might have raised an issue for the jury if timely urged, we are confronted with the elementary rule of law applicable to such cases that a party who desires to rescind a contract on the ground of fraud must be guilty of no unreasonable delay, and upon discovery of the fraud act promptly, make or tender restitution, announce his purpose and adhere to it; otherwise he will be held to have waived the objection and ratified the contract. In the recent case of *Bertha* v. *Motor Car Co.*. 180 Mich. 51 (146 N. W. 389), cited by appellant, and held to be a case for the jury, the court emphasizes by repetition the fact that immediately on discovering that defendant's physician had misrepresented the extent of his injury plaintiff repudiated the settlement and tendered back, with interest, what had been paid him.

While no duty exists to repudiate the contract and return the consideration until the fraud is discovered, and in such case intervening time will not affect the complaining party's rights, this court has said:

"The decisions on fraud all hold in this State that a party defrauded is bound to use active diligence, and to use no unavoidable delay in complaining." *Lewless* v. *Railroad Co.*, 65 Mich. 292 (32 N. W. 790).

Digitized by Google

We are not dealing with a c
contract on the ground of fr
the cognizance of a court of e
for the application of other
at law based upon the theory
has already rescinded it, as h
power to do without the aid o
sence of proof of prompt re
offer to return, whatever of v
sideration of the settlement,
legal bar to prosecution of the

In *Gibson* v. *Railroad Co.*, 1
44 Am. St. Rep. 586), plainti
road accident, and settled with
he had been under the influe
result of which he claimed t
possession of his mental facul
later he repudiated the settle
It developed that he was mor
at first supposed, and he was
at defendant's expense for m
Of this the court said in part

"Whatever may have been t
four or five hours after the op
was signed, there is no prete
normal condition all the month
* * * Every day that he
continued to accept benefits, a
settlement, without regard t
knowledge, was in affirmanc
conduct in keeping the money
of all his bills at the hospital,
plete mental health, with the
to where the money came fr
his bills and why, is only cons
to affirm the contract. It is
affirmance."

In justification of the delay
lease could arise from failur

Digitized by Google

until claimant was informed both of the falsity of the representations upon which he relied in making the settlement and of his right to disaffirm on that ground, citing *Alabama, etc., R. Co.* v. *Jones*, 73 Miss. 110 (19 South. 105). We are not prepared to indorse the conclusions reached in that case as applied to an action at law of this nature. There is no proof nor presumption that claimant at any time believed himself without redress because he had been fraudulently induced to sign a release which he would not otherwise have signed. He was a man of mature years, not ignorant nor illiterate. He stated that he commenced to speak about it with an acquaintance, asking him if he knew of a good attorney, and was referred to the counsel he engaged. He at first stated he consulted counsel in the summer of 1912, but later corrected himself, and fixed the time as the latter part of the summer of 1911. He took no steps, however, to rescind or refund, to the knowledge of defendant or its representatives, until April, 1912. For over 18 months after full knowledge of that of which he now complains he remained silent and treated the matter as a full and final settlement. During that time he ratified the releases he had signed, both by his silence and failure to return that of value which he had received under the contract and by accepting further benefits, without intimation of dissatisfaction, after full cognizance of the facts which he now urges as a ground of rescission. His long acquiescence and failure to complain promptly, as was his duty on discovery of the true conditions operated, as a matter of law, under the undisputed facts, to reaffirm the contract of settlement which has now become a bar to the prosecution of his stated original cause of action.

The judgment is affirmed.

BROOKE, C. J., and KUHN, STONE, OSTRANDER, BIRD, and MOORE, JJ., concurred.

The late Justice MCALVAY, who sat in this case, took no part in this decision.

Digitized by Google

HOLMBERG *v.* LAKE SHORE & MICHIGAN SOU' RAILWAY CO.

1. RAILROADS—MASTER AND SERVANT—NEGLIGENCE—RU TRIBUTORY NEGLIGENCE—OPERATION OF TRAINS.

Plaintiff, a freight engineer, in charge of a gra was injured in a collision with defendant's passer which he claimed was running ahead of tim excessive speed. His own testimony showed th operating his train in violation of defendant's quiring the engineer to protect the head of his to enter a switch or spur with it, at least fiv ahead of the schedule time of the passenger. the surroundings and the lay of the tracks which a reverse curve at the point of impact, shutti view ahead. Plaintiff's train was an extra an one, that the rules required him to guard by against the regular passenger train, whose time closely coincided with the time on which he wa Claiming that at 8:03 a. m. somewhat over 700 the switch that he trying to make, the passen due at the switch at 8:05, collided with his frei and cars, plaintiff brought action based upon t employers' liability act. (4 U. S. Comp. Stat. 191 *Held*, that the trial court erred in leaving to th question of contributory negligence, but shoul structed them that plaintiff was guilty of neglige ing or diminishing his right to damages for th received.[1]

2. SAME—FELLOW SERVANTS—CONTRIBUTORY NEGLIGENCE STATUTE—NEGLIGENCE.

It is the duty of State courts to accept jurisdi enforce the Federal statute if their jurisdiction lished by local laws is adequate, and as to the re affecting the burden of proof, the rule is bey matters of State procedure, and these courts m the Federal regulations.[2]

---

[1]On constitutionality, application and effect of empl bility act, see notes in 47 L. R. A. (N. S.) 38, L. R. A.

[2]The power of State court to enforce right under F ployers' liability act is discussed in notes in 40 L. R. . 684.

Digitized by Google

3. SAME—EVIDENCE—DIRECTED VERDICT—ONUS PROBANDI.

Assuming that under the congressional enactment the allegation that plaintiff was without fault or negligence as set up in the declaration is surplusage and need not be established, yet if plaintiff's negligence is shown by his own evidence, the defendant may have the benefit, notwithstanding that the *onus probandi* as to contributory negligence may be shifted by the express language of the statute; any presumption of law that plaintiff was not at fault being overthrown by plaintiff's proofs, or the undisputed evidence, his right of recovery must be considered barred, and a verdict ought to be instructed.

4. SAME — DIRECTED VERDICT — COMPARATIVE NEGLIGENCE — NEW TRIAL.

Where the amount of the verdict indicates that the jury did not take into consideration the statutory requirement that plaintiff's negligence be taken into consideration as diminishing the damages recoverable but for his said fault or neglect, the judgment should be set aside on motion for a new trial.

5. SAME—INTERSTATE COMMERCE—REPAIRS AND IMPROVEMENTS—TRACK MAINTENANCE.

Testimony that defendant's road extended into a foreign State, that it regularly engaged in interstate traffic and plaintiff's freight train was hauling gravel for use in repairing and improving the roadbed used for these purposes, sufficiently established that plaintiff was engaged in furthering interstate commerce, and brought him within the act.

6. SAME—EVIDENCE.

Track repairs and maintenance facilitate and are essential to interstate commerce, and the work of an employee, who is engaged thereon is so directly concerned with and beneficial to all commerce which uses the road, that it must be *held* to bring the servant within the limits of the statute.

Error to Kent; McDonald, J. Submitted April 19, 1915. (Docket No. 32.) Decided December 21, 1915.

Case by Carl O. Holmberg against the Lake Shore &

Digitized by Google

Michigan Southern Railway Company for pers
juries. Judgment for plaintiff. Defendant
error. Reversed.

Clapperton, Owen & Hatten (*Samuel H. K*
counsel), for appellant.

Lombard, Hext & Washburn, for appellee.

STEERE, J. On June 18, 1913, shortly after
a loaded gravel train of 16 cars, hauled by
freight engine, south-bound from Grand Ra
Three Rivers, running as "Extra 5761," met in
on collision a regular north-bound passenge
No. 532, consisting of four cars and a passe
gine, on a reverse curve of defendant's roa
north yard in the city of Kalamazoo. The
and conductor of the passenger train were ki
several of the passengers injured. Plaintiff w
neer on the gravel, Extra 5761, and the only
injured on his train, his foot having been ca
tween the beams of the tank and engine as
about to leave his cab and the lower part of
crushed, necessitating amputation about thre
below the knee. He brought this action in th
court of Kent county, under the Federal em
liability act, to recover damages for such inj
negligence charged being that the passenger t
ahead of time and running at an excessive
speed, without a proper lookout being maintai
the trial court he recovered a verdict and j
for $8,000. A subsequent motion for a new
leging, amongst other things, that the verdict
cessive and against the overwhelming weight
dence, was denied.

Passenger train No. 532, going north on its
run, was about 300 feet in length, and consist
engine, a mail car, baggage car, and two p

Digitized by Google

coaches. It was what is classed in railroad operation as a "superior train," with schedule time and precedence over all other trains. By its schedule time it was due to leave the Kalamazoo central station at 8 o'clock. Its time at the north yard switch was 8:05; the collision occurred 720 feet north of the switch. It arrived at Kalamazoo that morning on time, 7:50, and a clearance card was given it by the train dispatcher to proceed on its run. The brakeman and fireman of the train testified that it backed out from the central station about one minute late, and as usual went round the "Y," crossing the tracks of two other railroads, stopping at one of them, and coming down on defendant's main line south of Main street, where it stopped and received orders from the operator, who testified it left that point at 8:04 and, as was his duty, he entered the time upon the train entry sheet, which he produced and verified. At the Michigan Central crossing, some distance north of Main street, the towerman at the intersection of the tracks entered its passing upon his train register as 8:05. The coroner, who examined the dead body of the engineer of this train as it lay by the track after the accident, found that his watch, with the crystal broken, was jammed and had stopped, as its hands showed, at 8:06. This evidence of the exact time of the movements of No. 532 before and when the accident occurred is contradicted by the unsupported testimony of plaintiff that just after the accident he looked at his watch and found the passenger train was three minutes ahead of time, or 8:03, although inferential support is claimed in the statement of Endres, his fireman, that they left the standard switch about a half mile north of the place of the accident, where they had stopped either "just before we stopped or just before we started; * * * it was a little before 8 o'clock" by his watch. Plaintiff claims they left this point at 7:59.

Digitized by Google

Plaintiff was a man 40 years of age, experie
railroading, familiar with the stations and tra
the Kalamazoo division of defendant's line,
been in its employ for 14 years as fireman an
neer, running on passenger, freight, and special
He testified that he was familiar with the r
force upon the road; had passed his examinat
promotion as engineer in 1905; had his rule bc
studied it; was well acquainted with the route
running, its stations, sidings, and the curve wh
accident occurred; knew the time schedule of t
senger train with which he collided, the course i
follow in leaving Kalamazoo north-bound; that i
ordinarily pass through the north yards withou
ping if on time or behind time; and that his ow
was an inferior train which by rule was requ
look out for and keep out of the way of that tra
at meeting points "take the siding and clear
perior train at least five minutes, and must p
the siding when practicable." He also testifi
the engineer of the passenger train who was kil
more experience as an engineer than himself.

The gravel train upon which plaintiff was e
was over 690 feet long, consisting of 14 cars
with gravel, a car carrying what is called a
for unloading them, a caboose and engine. Th
was composed of the conductor, engineer, firem
two brakemen. It left Grand Rapids for Three
that morning at 5:30 and later than usual, s
under the following order to the engineer: "
5761 will run extra Wentworth to Three River
Otsego plaintiff had received an order that
5761 will meet 532 at north yards Kalamazoo
proceeded to Plainwell, 12 miles north of Kala
where water was taken and machinery oiled.
tiff there sent the brakeman to the operator t

Digitized by Google

if the passenger was late and ask if they could give him an order for that train. The operator communicated with the train dispatcher and replied that 532 was on time and he could give them no orders against it, stating the dispatcher wanted to know if they had time to make Cooper without an order. The brakeman, looking at his watch, said they had. He testified that he reported to plaintiff what the operator said and asked about making Cooper, and his own reply to the inquiry. Plaintiff testified that the brakeman reported that 532 was on time, and the dispatcher would give them no order against it, from which he knew he had to look out for the time and schedule of the passenger train, but that nothing was reported as to a conversation about Cooper. Cooper was a station between Plainwell and Kalamazoo, about 5½ miles from defendant's north yards in the latter city. They left Plainwell at 7:40, the brakeman riding in the engine cab. Plaintiff was running fast, at times over 50 miles an hour, and did not slacken his train or stop at Cooper. Having expected him to do so, the brakeman then looked at his watch, and the fireman, sitting near him, also looked. Both testify it was 7:55. The brakeman asked plaintiff if he was going to stop, and, receiving a reply that they had time to make the Standard Paper Company switch at Kalamazoo, told him they were on short time and taking a chance while the fireman expressed his misgivings by shaking his head at plaintiff, who states that he did not hear or see these warnings. Plaintiff stopped at the paper mill switch with a view, as he states, to heading in on that siding, but on receiving a signal from the conductor at the rear of the train went on. He testifies it was then 7:59. In reply to a suggestion of his fireman they had better stop there, he said they were all right and started on, putting the brakeman on the pilot of the engine with a flag. The siding he left was a private,

Digitized by Google

industrial side track, not recognized by dispat for passing trains, though sometimes used in an gency by those operating trains. The signal fro rear afforded plaintiff no excuse or justificatio proceeding in violation of any rule. He admitte the engineer is responsible for seeing that the of the train is protected, without instructions that he was familiar with the rule which provi follows:

"The engineman is jointly and equally respo with the conductor for the safety of his trai movement of the same in strict compliance wit rule, and he must decline to obey any order whi volves peril to his train or violation of the rul

From where he started to the curve was about feet and the length of this double curve upon wh then entered was 1,650 feet. The effect of this places the main track proceeding south from it 500 feet farther to the west than the main trac ning from the north end of the curve; the g direction of the curve being southwest and nort Familiar with these conditions, knowing the ob tions which the reverse curve presented to a along the track, informed that the passenger which had the right of way, was then on tim had left the Kalamazoo central station, he start heavy gravel extra towards it and entered the running, as he estimates, at 10 miles an hour met it on the curve. Assuming, as he testifies the collision occurred at 8:03 and 532 was ahe schedule time, of which the trial court held ' was some slight evidence" for the jury, plaintif yet palpably proceeding in violation of the rules he carried in his pocket and was familiar with taining the admonition:

"Obedience to the rules is essential to the saf

Digitized by Google

passengers and employees, and to the protection of property."

He knew the approaching passenger train was due to pass the north yard switch just ahead of him at 8:05 and the rules required him to have his long and heavy train side-tracked and clear at least five minutes before it passed or, if that became impracticable, to guard his train with a flagman a sufficient distance ahead to insure full protection.

It is obvious that this collision can be attributed to no one but the engineers of those trains—one or both. Plaintiff alleges in his declaration and claims that he was free from negligence, and as a ground of recovering damages in this case lays the blame upon the dead engineer, charging him with running his train ahead of time at an excessive rate of speed, and failing to discover plaintiff's train as early as he might and take action sooner to stop his own. While upon these propositions there is supporting evidence which might not justify the court in disposing of all of them as questions of law, it was, as a whole, strongly contradicted by undisputed evidential facts and the testimony of witnesses in a position to know; and, as bearing upon the deceased's negligence, such evidence should be considered in connection with the fact that he had just received a clearance card to proceed on his run, with a superior train, practically on time, with no intimation of there being an extra train approaching; that he owed no special duty to anticipate or look out for plaintiff at that time or place, but, on the contrary, had reason, and the right, to assume that any inferior extra train which might be using the track to the north of him would clear upon a siding within the rule time or, at least, protect itself by a flagman sent ahead sufficient distance for safety.

The trial court refused defendant's request to charge the jury as a matter of law that plaintiff was

Digitized by Google

guilty of negligence contributing to the accide submitted that question to them as an issue charging that:

"The burden of proof is on the defendant t how much the damages are diminished by re the contributory negligence of the plaintiff. If you find that plaintiff is entitled to recov that he was not guilty of any contributory ne which contributed in any degree to the inj would be entitled to full damages."

The court further instructed the jury as to t eral rule for measure of damages in personal cases, told them if they found for plaintiff they first determine his full damages which should amount of their verdict, "unless the plaint guilty of contributory negligence," in which c amount of damages resulting from his own ne should be subtracted from the total and the d should be "apportioned according to the relativ or negligence of the parties," thus in effect inst the jury that if any negligence on the part of de appeared, a verdict must be rendered in favor o tiff for the full measure of all damages susta him, irrespective of what his own evidence di unless, assuming the burden of proof as to contr negligence, defendant showed how much pl damages were diminished by reason thereof.

The Federal statute under which this action provides, as does Act No. 104, Pub. Acts 1909 State, that the fact an employee may have bee of contributory negligence shall not bar a re The pertinent portion of the Federal act is as (35 U. S. Stat. 66, volume 4, U. S. Comp. Sta § 8659):

"In all actions hereafter brought against a common carrier by railroad under or by virtue of the provisions of this act to recover dama personal injuries to an employee, or where s juries have resulted in his death, the fact t

Digitized by Google

employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee."

This modifies, as does our own statute, the common-law rule formerly applied in this jurisdiction that recovery cannot be had for injuries resulting from another's negligence, if negligence of the person injured was a contributing cause.

Though at one time questioned, the right and duty of State courts to accept jurisdiction and enforce this Federal act, when their jurisdiction as prescribed by local laws is adequate, was settled affirmatively in *Mondou* v. *Railroad Co.*, 223 U. S. 1 (32 Sup. Ct. 169, 38 L. R. A. [N. S.] 44).

The Federal courts hold that the burden of proving contributory negligence is on the defendant, that the rule is beyond mere matters of State procedure and in administering this act the State courts must follow the Federal rule. *Central Vermont R. Co.* v. *White*, 238 U. S. 508 (35 Sup. Ct. 865).

Plaintiff has alleged in his declaration that he was "without fault or negligence on his part"; but, assuming that under the Federal rule this is surplusage and he was not required to prove such allegation, and, accepting the rule in all its aspects, we do not understand the Federal courts have ever held that where plaintiff's negligence is established by his own evidence, the defendant could not have the benefit of it. The *onus probandi* as to defendant begins with the condition of affairs as it stands upon the undisputed facts as plaintiff's testimony leaves them. Here any presumption of law that plaintiff was not in fault which might otherwise obtain was overthrown by his own evidence, and it is clearly disclosed by the undisputed facts that plaintiff was guilty of such negligence causing or contributing to the accident as would, at common law,

Digitized by Google

have entirely barred recovery. That plaintif
lating well-known rules of his company v
accident occurred is conclusively shown. H
a matter of law, guilty of negligence, and
should have so instructed the jury before s
to them the questions of defendant's negli
apportionment of damages. The following
upon that subject from the majority opinion
v. *Railway Co.*, 168 Mich. 1 (133 N. W. 993
many respects, applicable to the facts presen

"The law requires the making of regula
rules by railroads. It punishes men who disc
by fine and imprisonment. It is a startling p
to men who travel on railroads that a regu
quiring engineers to observe the common r
road and keep to the right track may be
with impunity whenever an employee may ha
to think a particular train will not run; and
that, but, after causing the death of one, pain
to several, and wrecking his employer's pro
subjecting it to the payment of damages to it
gers, he may still sue the employer and reco
damages upon the theory that his criminal
ence was invited by reason of the employer
to anticipate and provide against it by taking
its confidence, to the general demoralizati
business. Railroading is a matter of minutes
onds. * * * Great care is taken to pr
public against the consequences of disobedien
take. The rules do not permit an engineer
protected on the time of a regular train, eve
he has reason to believe it will not run. H
required to protect against accident by ob
rule, and it is made criminal to do otherwise.
rules of railroad companies cannot be treated
gated by such railroad companies on testim
ing to show nothing more substantial than i
nate and unreported criminal disobedience on
of some of the employees. This is simply
'taking a chance,' whereby many others 'were
take chances.'"

Digitized by Google

The amount of the verdict in this case indicates that the jury did not diminish the damages "in proportion to the amount of negligence attributable to such employee," and in that aspect of the case it was clearly excessive.

Although the errors pointed out necessitate a reversal, as the case is not finally disposed of here, it is perhaps proper to state this court is unable to acquiesce in defendant's contention that the trial court should have dismissed the case for want of jurisdiction because plaintiff was not shown to have been engaged in interstate commerce at the time of the accident. It is undisputed that defendant's line extends into other States, and that it is regularly engaged in transporting interstate merchandise over its lines. Plaintiff's train was engaged in hauling gravel for use in repairing or improving the roadbed over which interstate commerce regularly passed. While there is unusual conflict and contradiction in both the State and Federal authorities upon the question of when an employee of an interstate commerce road is or is not working under the provisions of the act, and even upon this direct question of track repair or improvements, it must be conceded the Federal authorities are controlling. The greatest number and latest decisions from that source have, we think, made a distinction between rolling stock, tools, and other appliances of a railroad which may or may not be used in its interstate service and its tracks, and settled the proposition that track maintenance or repairs not only facilitate, but are imperatively necessary to, all interstate commerce passing over the line; and the work of one engaged in such repairs is so directly connected and immediately beneficial to all commerce which uses the road that he must be regarded as covered by the act. *Pederson* v. *Railroad Co.*, 229 U. S. 146 (33 Sup. Ct. 648, Am. & Eng. Ann. Cas. 1914C, 153); *Zikos*

Digitized by Google

v. *Railroad & Navigation Co.* (C. C.), 179 Fed. 893; *Thomson* v. *Railroad Co.* (D. C.), 205 Fed. 203; *Tralich* v. *Railway Co.* (D. C.), 217 Fed. 675. In the latter case plaintiff was working on a steam shovel engaged in removing earth from the tracks and roadbed of a railroad which carried interstate merchandise.

For the reasons previously stated, the judgment is reversed and a new trial granted.

KUHN, STONE, BIRD, and MOORE, JJ., concurred with STEERE, J.

OSTRANDER, J. I think there is no testimony of any negligence of the defendant causing or contributing to the injury.

BROOKE, C. J., concurred with OSTRANDER, J.

The late Justice MCALVAY took no part in this decision.

SCHOOK *v.* ZIMMERMAN.

1. EQUITY—JURISDICTION—ADEQUATE REMEDY AT LAW.

Although the court of equity retains jurisdiction of controversies for which the court of law may afford adequate relief, when involved with or growing out of an equitable cause, that confers jurisdiction upon the court in chancery, the bare pleading in conjunction with such issues of equitable rights not sufficiently proved does not give equity the right to try a controversy of otherwise exclusive law jurisdiction: the legal remedy administered in chancery must be connected with and grow out of an equitable right.

Digitized by Google

2. SAME—FIDUCIARY RELATIONS—REMEDIES.

Complainant, a liquor dealer, claimed that defendants visited his saloon during a storm and inquired about mining properties in the neighborhood, saying that they were looking for a mine and informing complainant that they had no expectation of securing it for nothing, and that if he could find them a workable mine, they would "whack" with him. He directed them to certain mineral lands which proved to contain valuable deposits, and defendants secured the property and developed it under a royalty contract. *Held*, in a suit for specific performance of the alleged agreement, that complainant's remedy, if any, was at law, that no such definite contract as the court of equity must find was proven and that no fiduciary relation existed such as would give complainant a right to an accounting, or to follow the profits as a trust.

3. SAME—IMPLIED CONTRACT—CUSTOM—NOTICE.

Proof of a custom to pay a definite percentage of the profits could not bind defendants, who were not shown to have notice or knowledge of a usage of the kind averred.

4. SAME—DEFINITE CONTRACT.

Though an action at law may be maintained for breach of contract, some of the terms of which have not been established with exactitude, it is otherwise in proceedings for specific enforcement, which require a greater degree of certainty than do actions for damages.

5. SAME.

The term "whack" claimed to have been used in the negotiations between the parties could not support specific enforcement, which can only be decreed if the intent of the parties is manifest; and, as the phrase ordinarily means to divide into shares, apportion, square accounts, or pay, the proportion to which either was entitled was conjectural.

Appeal from Iron; Flannigan, J. Submitted June 9, 1915. (Docket No. 21.) Decided December 21, 1915.

Bill by Paul Schook against Eugene Zimmerman and others for specific performance. From a decree

Digitized by Google

for complainant granting part relief both par
peal. Reversed.

F. H. Abbott (*M. J. Sherwood,* of counsel), f
plainant.

M. S. McDonough and *Charles H. Watson* (C
B. Grant, of counsel), for defendants.

STEERE, J. The nature and purpose of co
ant's somewhat lengthy bill, stated in brief
is to obtain specific performance of an oral c
alleged to have been made with him by def
Clutts and Zimmerman, under which, through
forts, they secured an option for a 30-year iron
lease upon certain described land in Iron
Mich.; that after certain explorations, by whicl
ascertained the location contained extensive
of valuable iron ore, Zimmerman and Clutts
ferred the mining lease which they had obtaine
said option to the defendant Spring Valley Irc
pany, a corporation which they caused to be or
to take over and operate said property, and
through its officers and stockholders, had full
edge of complainant's agreement with Zimi
and Clutts and rights thereunder; that by su
tract, which complainant has fully performed
part, Zimmerman and Clutts agreed and promis
would give and set over to him "a just, fa
proper share of such profits as should therea
crue to the said defendants Zimmerman and Cl
their assigns, from mining, removing, and di
of the iron ore which would be taken from sai
under such mining lease," which they have n
and refused to do; that it is customary to p
receive for like service in the iron districts of
gan and in Iron county 10 cents on each ton
mined and shipped under such a lease as they o
through his efforts, and by their said agreeme

Digitized by Google

him complainant is justly entitled to such an amount as his share of the profits of such joint venture. Complainant therefore prays the court to decree specific performance of said contract and—

"determine the amount which this complainant is equitably entitled to receive upon each ton of iron ore heretofore mined and shipped, and upon each ton of iron ore which shall hereafter be mined and shipped from said lands by the said Spring Valley Iron Company, its successors or assigns, under said mining lease held by said company as aforesaid."

But, if the court finds that the defendant mining company is not liable upon such contract, that it determine and award to him a relative part of the capital stock of said company belonging to Zimmerman and Clutts, injunction being asked to restrain them from incumbering or disposing of their stock in the meantime. Defendants by their answer traverse and deny all material allegations of complainant's bill.

Complainant had been a resident of Iron county for over 20 years, working at first as a barkeeper at Iron River, but most of the time engaged in the saloon business for himself at Crystal Falls, where he was running a saloon and livery stable when he first met defendants Zimmerman and Clutts, in November, 1906. From the miners and explorers who frequented his saloon he acquired a general knowledge of what was being done in their line, and was fairly conversant with the mineral discoveries and developments in that vicinity. Prior to the day when he claims the contract sued upon was entered into, between the 15th and 20th of November, 1906, he had never heard of Clutts and Zimmerman, nor they of him, so far as shown. As he relates this first meeting, they presented themselves at the bar of his saloon between 4 and 5 o'clock in the afternoon of that day and asked for "a drink of O. F. C. Taylor bottled in bond," which he served

Digitized by Google

them, with the suggestion that it was a rather stormy day, in which view they concurred. Shortly following this, the contract for which specific performance is sought was entered into as follows:

"And they stood there a while and called for something, and they commenced to ask me—they asked me what kind of a town this was, and what kind of a country this was. I says: 'This was a lumber town, but now it is a mining town. Principally mining.' I says, 'It is one of the best mining towns in the upper peninsula.' So they started looking at one another and looked at me. They asked me if there was any properties here to be had. I says, 'I know of three properties to be had.' We talked a little while, and I says, 'I know of three properties to be had, and they are good ones.' 'Well, can you get us a property?' I says that I could. Then they stopped, and Mr. Zimmerman says to me, 'We will stop here and introduce ourselves. This gentleman doesn't know us, and we don't know him. My name is Eugene Zimmerman, from Detroit, and this is Mr. J. C. Clutts, from Wellston, Ohio. This gentleman has furnaces, and I own railroads, and we are up here to get a mine. Can you get a mine for us? Can you get us a property?' I said that I could. So he says: 'If you can get us a property, we don't want it for nothing. If you get us the property and it proves to be a mine, we will whack with you.' Mr. Zimmerman and Mr. Clutts said that. But I am a little ahead of my story. There were some people came in that I did not want to talk in front of, and I gave Mr. Zimmerman a wink and also Mr. Clutts, and they kept still, and I waited on them and they went out."

He further testified that they repeated this offer and promise to "whack" 5 or 10 times, and before they left the saloon said, in response to his suggestion, that when they got home they would send up an iron-mining man to see him; that they left that night, and complainant did not see them again until April, 1907. This is the only agreement of which he testifies, and constitutes the contract upon which this suit is found-

Digitized by Google

ed. His evidence as to subsequent events relates to their ratification and his performance of it. He says:

"I never had anything from these people than the agreement."

Defendant Clutts, a resident of Wellston, Ohio, was extensively interested in blast furnaces and coal mining, while defendant Zimmerman, of Cincinnati, Ohio, was president of the Ann Arbor and Detroit, Toledo & Ironton Railroads, prominently connected with and interested in railroad and steamboat transportation, as well as various mining, manufacturing, and other enterprises. His road was carrying coal from Ohio to Frankfort on Lake Michigan, shipping it across the lake, and he conceived the idea of securing iron ore for return freight to furnaces located upon the road in Ohio. In furtherance of that project he several times visited and interviewed officials of the Carpenter-Cook Company, of Menominee, a patron of his railroad, which owned large tracts of land in Iron county, and on the occasion in question had just come from Menominee, following such an interview, accompanied by Clutts, who manufactured iron at Wellston on Zimmerman's line. Being impressed by representations of officials of the Carpenter-Cook Company and offered an option upon some of its land near Crystal Falls, they visited that city with a view to further investigation and, as they relate, ran into a blizzard, on account of which, owing to the stormy weather and deep snow, they decided to and did take the train on the same evening for Chicago, and while waiting for the next train out were directed, in answer to their inquiry for a good place to get a drink, to complainant's saloon, of which they availed themselves. They remained there some time, and fell into conversation with complainant, who waited upon them. In the conversation he learned that they were investigating the

Digitized by Google

Carpenter-Cook lands with a view to securing iron ore property. Their version of the conversation which followed is that complainant claimed to know where the Carpenter-Cook lands were, and talked familiarly of different mines and prospects in that locality, stating he was interested in some properties in the vicinity which he would like to have them examine; that before they left they informed him they expected to send a man to look over the Carpenter-Cook lands, and they would be glad also to investigate his properties, but that no promise, agreement, or contract of any kind was entered into for him to secure them any mining property, nor suggestion made that they would "whack" with or engage his services for that purpose. They did, however, send a coal-mining man in Clutts' employ named Morrow up there, primarily to investigate the Carpenter-Cook lands, as he and they testify, and any other ore property that he might think worth looking into. Clutts gave him a letter to Cook & Carpenter, of Menominee, and also one to complainant. He stopped at Menominee on his way up, where he spent some time going over the subject with Mr. Cook, after which he went on to Crystal Falls, where he was a stranger, and the next morning after his arrival met complainant Schook in his saloon, introducing himself and presenting the following letter:

"WELLSTON, OHIO, Dec. 13, 1906.

"MR. PAUL SCHOOK,

"Crystal Falls, Mich.

"*My Dear Sir:*

"This will introduce to you Mr. Jerry Morrow, who represents Col. Zimmerman and myself in looking after ore properties in your neighborhood. You will remember we spent an afternoon with you in talking over the matter and you had some friend at that time who had quite a good prospect. We will be pleased to have you show Mr. Morrow the same courtesies you did us.

Digitized by Google

"With kindest regards, I remain, yours truly,
"J. C. CLUTTS."

Morrow discussed with Schook the purpose of his visit to that region, and hired from him rigs and a driver to visit certain of the Carpenter-Cook lands, as well as other property around Crystal Falls. He remained at Crystal Falls, looking around, for about three days, during which time he several times talked upon the subject of his mission with Schook, who proposed certain properties which he desired Morrow to investigate, and upon some of which Morrow later took options from the owners, without beneficial results. While at Menominee Morrow had been advised by Mr. Cook to investigate the mining prospects at Iron River in that county, and on December 26, 1906, or the third day after his arrival at Crystal Falls, they drove over there together, upon whose initiative is a matter of dispute. On the way over Schook told Morrow of a mining prospect known as the Kinney property described as E. ½ of N. W. ¼, Sec. 7, town 42 north, range 34 west, near Iron River, upon which he thought an option could be obtained and which he recommended. Prior to this time neither Morrow, Clutts, nor Zimmerman knew or had ever heard of this property, and it was first made known to the two last-mentioned defendants by Morrow.

A Mr. McKinnon, with whom Schook was well acquainted, held a 30-year mining lease of this property, upon which he and others had done considerable exploratory work without yet discovering any valuable deposit of commercial ore, and, being himself unable to further prosecute explorations, he had given an option upon his rights to other parties who had also explored unsuccessfully, and no work was then being done by them, as their option was about to expire. This tract was recognized as well located, adjoining land upon which ore had been found, so that it con-

Digitized by Google

tinued to be regarded by those interested as a promising prospect. Schook had knowledge of these things, and also claimed to have special information of its possibilities from men who had worked upon adjoining property. While driving Morrow to Iron River he outlined these matters to him, and highly recommended the property as a desirable one, upon which he proposed to secure an option for a sublease from McKinnon to Zimmerman and Clutts in performance, as he claimed, of his agreement to obtain a mine for them. On their arrival at Iron River Schook took Morrow to his brother's saloon, where he left him to get warm, and hunted up McKinnon, with whom he had an interview, which he details in his testimony at great length, and as a result of which, according to his statements, McKinnon promised him, for Zimmerman and Clutts, an option for a sublease of the property when the present outstanding option should expire, which would be in three days. This McKinnon denied, testifying positively that Morrow was the only one with whom he made preliminary agreements, saying:

"Paul Schook never came to me to obtain an option for a mining lease on the Kinney property for any one."

It should, however, be stated in fairness to Schook's claim that a careful examination of McKinnon's testimony as a whole indicates a remarkable lack of memory touching undisputed facts which must have been known to him and which tend in Schook's favor. Whatever the facts of their interview may be, it is undisputed that Schook took McKinnon to Morrow and introduced him, exercising his good offices in bringing the parties together upon an agreement for an option of a sublease of the Kinney property to defendants Clutts and Zimmerman, and then returned to Crystal

Digitized by Google

Falls, leaving Morrow at Iron River to negotiate the details of the deal, with the apparent understanding amongst those interested that when the former option expired McKinnon would give a new one to those whom Morrow represented. On January 2, 1907, McKinnon gave Morrow the following:

"BOYINGTON HOUSE. LIVERY IN CONNECTION.
"BOYINGTON & SON, PROPRIETORS.
"IRON RIVER, MICH., Jan. 2, 1907.

"JERRY MORROW, ESQ.,
"Iron River, Mich.

"*Dear Sir:*

"In our conversation about the Kinney option & lease form, I will hold the privilege open till the 15th inst. for you to decide to take an option or not after the form read by you on Saturday 29. December, 1906.

"D. C. MACKINNON."

On the same day Morrow telegraphed Clutts from Iron River, "Arrange to come here on receipt of letter mailed tonight, very important," writing him a lengthy letter descriptive of the district and Kinney property, of which he stated he had succeeded in getting hold, making no mention of Schook. Schook, who was at Crystal Falls, had obtained Clutts' address from Morrow and kept posted by telephone communications with him as to how negotiations were progressing. On January 5, 1907, he sent the following telegram:

"CRYSTAL FALLS, MICH., Jany 5th, 1907.

"J. C. CLUTTS,
"Wellston, Ohio.

"Matters have so shaped themselves that your immediate presence here is imperative. Danger of losing deal be here at all hazards not later than Tuesday night deal is too big to take any chances

"Answer PAUL SCHOOK."

This was answered as follows:

"WELLSTON, OHIO, 7.

"PAUL SCHOOK,
"Crystal Falls, Mich.

"Impossible for me to come to your place right away.

Digitized by Google

See that Morrow gets option so I can arra
him to close after seeing him. Have him b
of lease along with him. Wire me Bood
Toledo. J. C. C

From the lengthy testimony as to subseque
it is sufficient to state that Zimmerman a
obtained an option upon the Kinney propert
pended about $17,000 in explorations, makir
eries which were followed by their deman
receiving the sublease for which the option
and which, at their dictation, was issued t
fendant Spring Valley Iron Company, a co
with a large capitalization, which they org
take over and operate the property. They w
tically the owners and in control of this co
and its assets, sufficient stock being issued tc
torney and certain employees to formally o
corporation, from which they subsequently
back the money which they had advanced ir
tion and development.

While these matters were progressing C
Zimmerman made visits to Iron county, c
all the time in friendly communication and
with Schook, availed themselves of the co-oper
assistance which, by reason of his acquaint
various persons and knowledge of local cond
was able to afford. He claims to have rende
services in fulfillment of the original oral
made when they first met in his saloon, up
this suit is based under the allegations in
Of his former claims he was asked and ans
follows:

"*Q.* When you claimed to own an intere
mine, you meant what?

"*A.* An interest in the fee.

"*Q.* When you claimed to own an intere

Digitized by Google

Kinney mine, you have claimed to own an interest in what?

"*A.* In that lease."

He states that it was his then understanding "that the three of us was in that deal," and says he made no mention of "profits" "until we took that lease." Asked:

"Did you ever ask him [Morrow] what he had agreed with Mr. McKinnon in relation to the terms of the option and the extension and the other details?"

—he replied:

"No, sir; I had the property and I was to see they got it and they got it."

After it was ascertained that a valuable iron mine was discovered and in operation on the Kinney property, complainant, failing to obtain from defendants satisfactory recognition of his claim, filed this bill of complaint, October 20, 1911, claiming a right to share in the profits realized from the operation of said mine, based on the alleged oral contract made in his saloon some time between November 15 and 20, 1906. As a basis for ascertaining what share of the profits complainant was entitled to, he introduced testimony touching the amount of royalty others had received in that region for like services in successful mining promotions, under the claim that it was the general custom to pay 10 cents per ton in similar cases and his contract should be treated as made with reference to such custom.

The controlling issues of fact raised by the allegations of the bill and defendants' denying answer were, whether there was an express oral contract made as alleged and performed on complainant's part, the defendant corporation's liability under it if such contract was made, and the existence of a custom to pay 10 cents per ton royalty in similar cases, which could and should be construed as forming part of such contract.

Digitized by Google

A written opinion was filed by the trial court reviewing the case in its various aspects, in which the court found that the initial contract as alleged in complainant's bill, or the agreement to "whack" if he could get them a mine, "was not shown by a preponderance of the evidence," that "complainant failed to establish the existence of the custom" claimed, and that no liability on the part of the defendant corporation was shown, but concluded that what passed between the parties on the occasion of their first meeting—

"was equivalent to a proposal by Zimmerman and Clutts that if Mr. Schook brought them a property which proved to be a mine, they would reasonably compensate him for his services."

The court thereupon proceeded to determine and decree what it deemed reasonable compensation for the services it was found Schook had rendered, on the assumption, as is inferable, that, having obtained jurisdiction under the equitable allegations in complainant's bill, the court should retain jurisdiction to dispose of the whole controversy, and rendered a decree requiring Zimmerman and Clutts to pay complainant 4 cents per ton on all ore mined from the Kinney property during the life of the lease which they had obtained, on which basis the sum of $21,018.24 was found due and payable forthwith; declared a lien upon all their stock in the defendant iron company for any sums due or to become due from them to said complainant by reason thereof; required them to forthwith present their certificates of stock to said company to be indorsed, and that said company indorse upon them a notation of such lien and spread upon its records a copy of such decree. From this decree both parties have appealed. Complainant contends that the decree should be modified to conform with the allegations in his bill and supporting proofs under which the alleged contract should be sustained; that relief should be

Digitized by Google

granted directly against the defendant company, as well as against Zimmerman and Clutts, one-third of whose stock in said company should be awarded outright to complainant, or that they should be decreed to pay him 10 cents per ton for all ore mined. Defendants contend, on the other hand, that the equitable grounds for relief stated in complainant's bill were not sustained by the evidence, and the court, having necessarily so found, was without jurisdiction to award damages on a bare implied contract to compensate for services performed which differed from that alleged in the bill and involved only a promise to pay, thus making a case within the exclusive jurisdiction of a court of law.

The latter contention raises a serious question under the pleadings and proofs, whatever view may be taken of the intrinsic merits of complainant's claim. While equity will retain jurisdiction to settle controversies for which courts of law afford adequate relief when they are involved with and grow out of an equitable cause which gives the chancery court jurisdiction, the bare pleading, in connection with them, of equitable rights not proven does not confer jurisdiction to try such controversies, which otherwise are of exclusive law jurisdiction. The legal remedy administered in an equity court must be connected with and grow out of an equitable right both alleged and proven.

"There is no authority for holding that equity can grant damages unless there is some case of equitable relief made out also, to which the damages would be applicable or subsidiary." *Bourget* v. *Monroe*, 58 Mich. 563 (25 N. W. 514).

The only ground for equitable relief stated in complainant's bill is a trust, or fiduciary, relation between the parties, based upon the claim of a right under the alleged agreement to share in the profits accruing to defendants from the Kinney mine, entitling him to an

Digitized by Google

accounting, the profits constituting a trust fund. The trial court did not, and, as an examination of this record convinces us, could not find that the contract alleged in complainant's bill was sustained or established by the evidence. The court did find that what passed between the parties in the saloon at the time they first met, when it is alleged the contract stated in the bill was entered into, was equivalent to a proposal that if complainant—

"brought them a property which proved to be a mine, they would reasonably compensate him for his services."

An express or implied agreement to pay, or compensate a person for services rendered, involves no suggestion of a division of profits. The court rightly found no custom proven as claimed; and, if one were shown, it could not be an element of the contract, unless it was also proved that Zimmerman and Clutts knew of and therefore presumably contracted with reference to it. There was no evidence of this, but, on the contrary, they were then strangers in that locality, and testify positively that they did not. Although it is alleged in complainant's bill that by the express contract relied upon they were to give him "a just, fair, and proper share of such profits," the record is entirely destitute of any evidence to sustain such allegations or mention of profits in that connection, beyond complainant's statement they said they would "whack" with him, which the court finds was not established by a preponderance of evidence. But if this was said, it furnishes no sufficient support for a chancery decree of specific performance of a contract to pay for service in profits.

"An action at law for breach of contract can often be maintained, although some of the terms of the contract are not established with exactness. It is otherwise where specific performance is required. The

Digitized by Google

court, in order that it may frame a decree in accordance with the intent of the parties, must be clearly apprised of the intent in all essential respects. A greater degree of certainty is required than in actions at law for damages." 36 Cyc. p. 589.

When in colloquial use the word "whack" has import of the nature suggested here, it is recognized by the lexicographers as slang, meaning "to divide into shares; apportion; parcel out; make a division settlement; square accounts; pay;" often in the phrase "to whack up." *Vide* Century Dictionary. Whether in this case, if used, it was intended to mean they would whack with complainant an interest in the property or lease, which, being oral, would be void under the statute of frauds, or pay him for his services, or settle with him, and on what basis, or give him a share in the profits as he claims, or a royalty on ore mined regardless of profits, and what share, are matters of conjecture upon which the alleged contract is uncertain and incomplete. In Waterman on Specific Performance of Contracts, p. 199, it is said:

"If there be strong doubt whether both parties to a contract understand it alike, the court will not decree specific performance."

In the footnote to this proposition it is said:

"Clearness and certainty in a contract are obviously so important and fundamental it seems scarcely necessary to say very much on the subject, or refer to many authorities. The following cases will give the student some idea of the manner in which precision in agreements is required by the courts" (citing a large number of authorities).

In the case of *Petrie* v. *Torrent*, 88 Mich. 43 (49 N. W. 1076), cited by complainant, and along the lines of which his bill appears to have been framed, the chancery court took jurisdiction and granted specific performance of the contract alleged and proven, be-

Digitized by Google

cause there was shown an express agreement
profits upon a given ratio, and therefore tr
tions existed between the parties, defendan
in his hands, and being trustee as to, agree
which were alleged and proven, entitling con
to an accounting. In that case the contrac
and sustained by the evidence was certain
plete. It appears that the complainant had
upon, control of, and the right to purchas
described timber lands which by their agre
surrendered to defendant under a contract
the amount of money each was to pay and
each was to perform, with full details of t
prise, were defined and stated at length, differ
cally in that particular from the instant ca
marked distinction we think runs through
cases cited by complainant, and all those we
able to consult, where specific performance
creed, whether the contract relied upon wa
in writing.

The conclusions of the court, with which
disagree, that, "whatever may have been said
ted in the conversation referred to," it wa
light of subsequent events, equivalent to a
of Zimmerman and Clutts that if Schook brou
a property which would prove to be a mine, t
reasonably compensate him for his services;
ing upon it, he brought the property to the
introduced McKinnon to their representative
his influence with McKinnon to deal with t
was instrumental in their obtaining this pro
which reason he is entitled to reasonable com
—go no farther than to make a case triable
if either party so elects, on the law side of
for breach of contract; but, aside from this,
ceding these conclusions, we are unable to
the record that the allegations in complain

Digitized by Google

which would, if true, confer upon an equity court authority to take jurisdiction, decree performance, and dispose of the matter are established by any competent evidence.

As a reason for and leading up to the decree that complainant, by reason of services rendered, was entitled to 4 cents per ton royalty for all ore produced by the mine under the sublease held by defendants, the court expressed the view that:

"It is not open to serious dispute but that before the Kinney option was issued to them, Zimmerman and Clutts actually knew of Mr. Schook's claims, and that with expectation his claims would be realized, he had and was continuing to employ himself in an effort to obtain the option for them, and that, with such knowledge, they accepted the results of and profited by his efforts without repudiation of his claims, until after the lease, as well as the option, was secured to them."

Conceding, as this imports, that, having proposed to compensate him for his services if he brought them a property which proved to be a mine, by afterwards accepting and profiting through his efforts without repudiating his claims, as known to them, until after they secured the lease, they were bound by such claims and estopped from denying them, the absence of equity jurisdiction yet remains; for there is no proof of claim for royalty at any time, and complainant himself testifies he made no claim for, or mention of, profits until the lease was taken. His claims before the lease was secured, if known to them, that they had agreed to whack, or compensate, him for services, as the court found, or that he owned an interest in the mine or lease, which he subsequently abandoned, which might some of them furnish ground for an action at law in assumpsit for breach of contract, could give no equity jurisdiction to render a decree for specific performance.

Digitized by Google

In this view of the case the other interest
tions presented by the rather extended record
cussed in the briefs of counsel do not deman
eration here. We are constrained to hold t
plainant's bill must be dismissed for the rea
his proofs, failing to correspond with the al
of his bill, do not show a contract sufficientl
in essential particulars to permit enforce
specific performance by a court of equity, a
leged grounds which give the chancery court
tion are sustained by the proofs.

The decree is therefore reversed without p
with costs to defendants.

BROOKE, C. J., and KUHN, STONE, OSTRAND
and MOORE, JJ., concurred.

The late Justice MCALVAY took no part in
cision.

PEOPLE v. GAGE.

1. CRIMINAL LAW—JURY—PANEL—VENUE—COURTS.
Under the provisions of statute relating to the
of additional jurors, more than 24 petit jurors
ed for a criminal trial, in the opinion of th
judge, the court is not permitted to designa
the commencement of the term a portion of
from which the additional jurors should be s
cluding the city in which the alleged offense
and certain adjacent territory. 1 Comp. Laws,
The accused is entitled to a trial by a jury of t
or locus of the crime with which he was ch

Digitized by Google

failure to recognize this right invaded the constitutional privilege of the said respondent.

2. SAME—CHANGE OF VENUE—DISCRETION—PREJUDICE.

The discretionary power vested in the circuit judge to allow or deny a change of venue is only reversible on appeal in case of abuse, but the discretion recognized by the court is not a personal, arbitrary discretion, being rather a legal discretion to be exercised according to established and well known principles of law.

3. SAME—VENUE—PREJUDICE—CHANGE.

Defendant was informed against for embezzlement and illegal conduct in the operation and failure of a private bank. The failure of the bank caused much excitement and public feeling. Various litigation arose over the firm affairs. On the hearing of a motion for change of venue, the trial court granted the request, but the cause coming on at a subsequent term, the order being treated as premature and irregular, a second motion was made and denied by the judge, who was of the opinion that sufficient time had elapsed so that public feeling and interest was less intense, and that a fair trial could be secured in the county. But during the intervening period political discussion took place regarding the bank failure and the evidence showed that the issues were kept alive and agitated. *Held*, that a change of venue should be granted, and it was error to find that sentiment had so changed in the county as to afford an opportunity for an impartial trial.

Exceptions before sentence from Cass; Des Voignes, J. Submitted June 17, 1915. (Docket No. 101.) Decided December 21, 1915.

Ira B. Gage was convicted of embezzlement and conspiracy to defraud. Reversed.

Grant Fellows, Attorney General, and *Otis Huff*, Prosecuting Attorney, for the people.

James H. Kinnane and *Clyde W. Ketcham*, for respondent.

STEERE, J. This case developed from the failure of a private bank in the city of Dowagiac, known as the

Digitized by Google

City Bank of Dowagiac, Ly
which closed its doors in Fe
nership, with its members as
schedules in bankruptcy, and
in March, 1908, resulting in
financial disturbances, and u
those actively connected with
to such an event.

Frank W. Lyle and respo
dent and cashier of said banl
1908, upon complaint of Oliv
ners, charged with embezzle
defraud and deceive said Ol
other partner, and the bank
were held for trial in the cir

A bank of similar name a
had existed in Dowagiac for
ant Oliver Lyle testified tha
with this bank as a stockhold
izations for over 30 years, i
organized as a national banl
rector when Frank Lyle's fat
This was followed by a priv
in 1900 it was incorporated
bank, called the City Bank of
business in that capacity u
abandoned its corporate form
a private bank in the form o
trouble with the State bankin
sive loans made to its presid
ers, not satisfactory to the d
violation of the banking law
mony discloses that this cou
gestion of the State bank co
Dowagiac about that time t
and while there stated to th
was a legal and feasible pla

Digitized by Google

once followed when in the banking business in the north, and when so organized they would be free to extend their loans and lines of credit in their discretion. Respondent was then and continued to be cashier of the bank. The stockholders met to reorganize on May 2, 1902, and he is convicted of having conspired on that date with Frank Lyle to defraud Oliver Lyle, Levi Lyle, and others. That Frank Lyle was the controlling spirit in the policy and management of this bank, and his reckless management, private ventures, and extravagance were the dominant cause of its downfall may be admitted as beyond successful contradiction; but respondent, who was the cashier under him and presumably familiar with the bank's condition, was himself a liberal borrower, and from what is disclosed by this voluminous record we think there was testimony raising an issue as to his guilty participation which it was proper to submit for the determination of a fair and impartial jury, legally constituted, and cannot concur in defendant's contention that as a matter of law a verdict should have been directed for defendant on the ground there was not a scintilla of evidence to go to the jury on the issue of his guilt.

The case came before this court in a preliminary proceeding brought by said Frank W. Lyle and respondent for the purpose of compelling the circuit court to grant a change of venue on a motion previously made before it and denied. *Lyle* v. *Circuit Judge*, 157 Mich. 33 (121 N. W. 306). The writ applied for was then denied on the ground that such interlocutory order will not be reviewed and a change of venue compelled on mandamus as such cases, involving discretionary action, are reviewable upon writ of error; it being said, however, by the justice who wrote the opinion:

"Were it competent for us to review his conclusion upon the merits, I should reach a different conclusion from his, but I think that it is not."

Digitized by Google

Frank W. Lyle died before the case was brought to trial. The motion for a change of venue was renewed and again denied at the opening of the trial, to which exception was duly taken and the ruling embodied in the bill of exceptions now before us for review.

Respondent was tried and convicted at the September, 1909, term of the circuit court of Cass county, under three of the 17 counts in the information filed against him of having, on May 2, 1904, conspired with one Frank W. Lyle to defraud, as before stated. Prior to the commencement of that term, on August 10, 1909, an order was made by the circuit judge directing that 40 additional petit jurors be drawn and summoned from the several lists returned according to law, "excepting the townships of Pokagon, Silver Creek, Wayne, and the city of Dowagiac." The order began as follows:

"It appearing that in the case of *People* v. *Ira B. Gage* and certain other cases to be heard in the next September term of the court, that the usual number of jurors will not be adequate out of which a jury may be selected for the several trials therein, because of the number of challenges that may be, and probably will be, exercised in said causes," etc.

It was further stated by the court during the argument of plaintiff's challenge to the array that said exclusion of the territory named was based on the motion first made for change of venue and was, "if anything, in favor of defendant, to avoid the bringing in of people who lived near the city of Dowagiac," the townships excluded being adjacent thereto.

When impaneling of a jury was directed at the commencement of the trial and 12 jurors had been called to the box, defendant's counsel interposed a challenge to the array for various reasons, but principally on the ground that the city of Dowagiac and townships excluded from said drawing represented approximately one-third of the population of the county, and

Digitized by Google

the order excluding them, but directing a drawing of jurors from the balance of the county was without authority of law and prejudicial to respondent, said jurors having been irregularly and illegally summoned, by which respondent was deprived of his constitutional right to a trial by a jury lawfully drawn and summoned from the body of the county, including the vicinage, according to the methods provided by statute for that purpose.

The order as made was not authorized by any statutory provision, nor within the power of the court. The jury so drawn was neither a jury of the vicinage nor of the county at large. The provision in section 342, 1 Comp. Laws, permitting the court as such to direct that jurors be drawn and summoned from near the county seat for convenience and the dispatch of business, after it is ascertained at a particular term that a sufficient number of qualified jurors were not drawn and summoned, or failed to appear, is not applicable under any circumstances to an order of this nature made by the circuit judge prior to the commencement of a term. This order was apparently made with reference to sections 340 and 341, which authorize the circuit judge, whenever in his opinion more than 24 jurors will be necessary for an approaching term, to make an order that such additional number as he deems necessary be drawn and summoned as provided by law, not exceeding 24, which order he must serve on and file with the county clerk at least 20 days before the commencement of the term; but these sections confer no authority to designate any portion of the county from which the jurors shall be drawn or to otherwise restrict the regularly prescribed manner of drawing and summoning. The order was therefore not sanctioned by law. *People* v. *Hall*, 48 Mich. 482 (12 N. W. 665, 42 Am. Rep. 477). The course pursued, as well as what was said by the court

Digitized by Google

in that connection, indicate that the order as made was a partial recognition at least of the merits of respondent's motion for a change of venue, in the particular that it attempted to effect a semi-change of venue by picking out that portion of the county to draw from which the court was inclined to think might be less affected by the feeling and prejudice shown in affidavits presented in support of the motion.

The record discloses that a motion for change of venue was early made and presented to the court in this case at a time when the judge of a neighboring circuit was presiding in Cass county, and an order was then granted changing the venue to Kalamazoo county. It was subsequently found and held that this order and the motion upon which it was based were premature, the case not then being at issue, for which reason the same was set aside, and the application was later renewed in proper form and time when the regular judge of the circuit was presiding. In then denying this motion the court conceded the propriety of the former order granting a change of venue, but prematurely made, saying in part that the incidents of the "somewhat sensational bank failure" were then fresh in the public mind, and "at that time it appeared, and quite reasonably so, that owing to the then condition of the public mind, it was proper to grant the prayer of respondent," but denied the motion on the ground that sufficient time had elapsed to cause the incident to pass from the minds of the people.

It is pointed out that to grant a change of venue is discretionary with the trial court; that courts of review will not disturb the action of trial courts in the exercise of such discretion except in cases of plain abuse, and it is urged that no abuse of discretion appears here. That the rule is as stated there can be no question, and this court has often so held, but in that

Digitized by Google

connection is the further rule that the discretion lodged in the trial court is not a private, arbitrary, or personal, but a legal, discretion, to be exercised according to established and well-known principles of law. The extent to which discretionary action may be reviewed was long ago well stated in 1 Lill. Abr. 477, as follows:

"Where anything is left to any person to be done according to his discretion, the law intends it must be done with sound discretion and according to law; and the Court of B. R. hath a power to redress things that are otherwise done, notwithstanding they are left to the discretion of those that do them."

This bank closed its doors in February, and was adjudicated a bankrupt in March, 1908. The premature order changing the venue of this case on the showing then presented was made June 22, 1908, by the Calhoun circuit judge then sitting in Cass county. In December, after the case was at issue, the motion was renewed. At the January term, 1909, it was argued before the regular judge of the Cass circuit, then presiding, who concurred with the opinion of the visiting judge that a change of venue was proper at the time it was ordered in June, 1908, but, with 25 affidavits in support of the motion added to the 12 upon which the former judge acted, denied the motion on the ground that by lapse of time excitement and prejudice had abated, the incident had passed from the minds of the people and previously existing reasons for a change of venue no longer obtained. This might be true to a greater degree had nothing occurred between June and January to refresh their recollections, although, had public discussion ceased, it could scarcely be thought to have passed from the minds of the many unpaid depositors of the bank scattered throughout the county, stated at from 800 to 1,000, and their friends, of whom, commenting on this matter, a local paper said:

"A great many citizens whose bank account is gone, would like the pleasure of hearing Lyle and Gage tried; that's about all they will ever get out of it."

Digitized by Google

The atmosphere of a courtroom packed with those citizens does not suggest an ideal venue for a fair and impartial trial on its merits of the cashier of that bank, irrespective of his guilt or innocence.

While the affidavits in support of and against this motion are at variance as to whether in the opinion of those making them such prejudice generally prevailed in the county as to preclude a fair and impartial trial, certain undisputed facts of permanent significance demand consideration. This prosecution centers upon the incidents of a "somewhat sensational bank failure," causing serious loss to some 800 or 1,000 depositors, attended and followed by public manifestations, ill feeling, and bitter discussion, both amongst citizens generally and in the public press, unfavorable to the bank and its officers so widespread and of such a nature that it was conceded by the prosecution prejudice prevailed for a time, and all courts called upon to consider the matter have concurred in the view that following the failure and up to June 22d the hostile feeling and prejudice against respondent in that county were such that for a fair and impartial trial a change of venue should be granted. An examination of the sensational accounts and severe criticisms of the affairs and management of the broken bank appearing in the local papers, with charges of criminal conduct on the part of its officers, together with affidavits of admittedly prominent and reliable citizens as to what was said and done, leaves no doubt upon that proposition.

It also appears, undisputed, that after June 22d, and at least up to the November election following, general interest was kept alive in the bank failure and this prosecution, which grew out of it, to such an extent that the case became one of the issues of the fall political campaign of 1908, and was generally discussed as a matter of public concern before the electors

Digitized by Google

of the county in that connection. The voters were appealed to against the "bank gang," and the defense of this case was bitterly attacked in public print, it being asserted amongst other things that "it would cost $5,000 to convict Lyle and Gage outside of Cass county." On the eve of election circulars or dodgers relating to the case were distributed by the then prosecuting attorney, and the public was assured that Lyle and Gage could be convicted at home for less than $500. The campaign discussion of this particular case became so personal, bitter, and acrimonious as to result in the commencement of a libel and slander suit involving attorneys connected with it, which furnished sensational copy for the local papers.

One prerequisite to entering upon a judicial trial, and paramount to the requisites which follow, is impartiality or freedom from prejudice so far as attainable, and if it appears this may not be found in the venue of first jurisdiction it is the duty of the court to seek it elsewhere, and the legal discretion existing in that connection may involve an inevitable legal inference from the undisputed facts.

We are agreed that under undisputed local conditions the fundamental prerequisites to a fair and impartial judicial trial demanded a transfer of this case to a disinterested and unaffected environment, and denial of the application therefor was prejudicial error resulting in a mistrial and consequently amounting, in contemplation of law as applied to judicial proceedings, to a miscarriage of justice.

The verdict is therefore set aside, and a new trial granted.

BROOKE, C. J., and KUHN, STONE, OSTRANDER, and BIRD, JJ., concurred. MOORE, J., did not sit.

The late Justice MCALVAY took no part in this decision.

Digitized by Google

PARKS *v.* BROOKS.

1. TRUSTS—DEEDS—SETTING ASIDE INSTRUMENT—EXECUTORS AND ADMINISTRATORS—FRAUD—FIDUCIARY RELATIONS.

The principal defendant was the administrator *de bonis non* of the will of Polly Robinson, deceased, and his son was one of the heirs and devisees under said testament, of a remainder in testator's farm, subject to a life interest in one of her daughters. Defendant, who was an uncle of complainants and fully trusted by them, administered the estate for many years. The son became subject to ill health and went to a warmer climate, during which time his father advanced to him considerable sums of money. Approaching complainants for the purpose of procuring a release or quitclaim of their interests in the real property mentioned, in his son's favor, defendant falsely represented the nature and effect of the conveyance, in that he stated it was only intended to vest in the son an interest which he would finally have anyway and told the grantors that they would have no interest in the property ultimately. These representations were untrue, and complainants were induced by them and by other misleading representations to sign the paper, which later proved to be a quitclaim deed of their remainder interest. The son died before the life tenant. Defendant administrator survived his son and the life tenant, having procured a deed from the son conveying the realty to himself, and he finally disposed of the premises for $4,500 more than the inventory value. He converted the proceeds to his own use. Complainants claimed the right to an accounting and to follow the funds derived from these transactions as a trust fund. *Held*, that the court of equity would compel defendant administrator to account for the property as for a portion of a trust estate, that the relations between himself and complainants were of a fiduciary nature, and that he was chargeable with the proceeds of the sale for the benefit of complainants.

2. SAME—PRINCIPAL AND AGENT—TRUSTS.

One occupying a position of trust and confidence may not place himself in a situation in which his interest may conflict with his duty.

Digitized by Google

3. SAME—LACHES—FIDUCIARY RELATIONS.

As the defense of laches rests primarily on the theory that it would be unjust to permit a claim to be enforced by reason of changed conditions or altered situation of the parties resulting from delay, mere lapse of time unaccompanied by any elements of estoppel will not deprive a complaining beneficiary of his remedy against his trustee.

4. SAME—MISTAKE—EQUITY.

As a general rule a mistake of law is no ground for equitable relief, but if the mistake has been induced by false representations of a party, standing in a relation of trust and confidence towards the injured one, the court of equity may interfere to remedy the injustice; or if it appear that a fiduciary perceived or knew of the mistaken view so held, and took advantage of the fact, the court will be more inclined to interpose its remedial powers.[1]

5. SAME—FRAUD—ACCOUNTING.

And equity will require an accounting, if fraud is charged and proved or if fiduciary relations exist.

6. SAME—ACCOUNTING—DISCOVERY.

Chancery courts not only have a general supervisory authority over trustees and strictly trust estates, but have power to correct breaches of trust and fraudulent conduct on the part of all persons that may occupy relations of confidence; and it is not essential that the accounts be mutual or complicated or that the bill be framed for a discovery; nor is the objection that complainant has an adequate remedy at law tenable as a defense to the proceeding.

Appeal from Oakland; Smith, J. Submitted June 28, 1915. (Docket No. 68.) Decided December 21, 1915.

Bill by Edgar A. Parks and others against Eugene Brooks and others to set aside a deed. From a decree for complainants defendant Brooks appeals. Affirmed.

[1] Mistake of law as to effect of instrument as a ground for its cancellation is discussed in note in 28 L. R. A. (N. S.) 785.

Digitized by Google

Andrew L. Moore and *Glenn C. Gillespie*, for complainants.

Aaron Perry and *John H. Patterson*, for defendant Brooks.

STEERE, J. This bill is filed by complainants to set aside as to them a quitclaim deed of certain property in Oakland county given, March 9, 1903, by themselves and Austin R. Parks to Francis Eugene Brooks, their cousin, son of defendant Eugene Brooks, on the ground that the same was obtained through fraud and misrepresentation on the part of said Eugene Brooks, and given without any consideration therefor. Complainant Ella J. is wife of Edgar A. Parks.

The property in question was a part of the estate of Polly Robinson, grandmother of said Edgar A. Parks, Austin R. Parks, Polly E. Bray, and Francis Eugene Brooks. Said Polly Robinson was a resident of the village of Birmingham, Oakland county, Mich., and died on or about January 31, 1889, testate, leaving as direct heirs at law and beneficiaries under her will two married daughters, Anna E. Parks and Martha J. Brooks. At the time of testatrix's death, Anna E. Parks had one daughter and two sons, said Polly E. Bray, Edgar A. Parks, and Austin R. Parks; and Martha J. Brooks had one son, said Francis E. Brooks, subsequently deceased, son of defendant Eugene Brooks, who is the husband of Martha J. Brooks, and therefore uncle by marriage of complainants.

Testatrix's will was dated October 5, 1881, and disposed of an estate inventoried at $61,809.62. Excepting five small bequests aggregating $150, this estate was all left to and divided between the two daughters Anna E. and Martha J. and their children, with a provision that, in case of the decease of any one of the children before receiving his or her share, said share should go in equal proportions to the surviving broth-

Digitized by Google

ers and sisters of such deceased child or children. Luther Stanley, of Birmingham, was nominated executor in this will, and for a time acted as such; but after three or four years he resigned, and defendant Eugene Brooks was appointed on December 27, 1892, by the probate court of Oakland county, administrator *de bonis non* with the will annexed, and had continued in charge of the estate as such administrator up to the time of filing this bill.

A portion of the estate was a business block in Pontiac, located on the main business street, and a farm of 110 acres in the township of Troy. By the provisions of testatrix's will; the Pontiac store property and the Troy farm, so called, were given for life to her daughter Martha J. Brooks, wife of defendant Eugene Brooks, and after her decease to her son Francis Eugene Brooks. This is the property involved in the present litigation, complainants' deed of which to their cousin it is sought to have set aside. Material paragraphs of the will essential to an understanding of the questions at issue are as follows:

Third. I give and bequeath to my daughter, Martha J. Brooks, my house and five village lots in Birmingham, which is my present homestead, together with all the household furniture therein. I also give and bequeath to my said daughter the use of my store and lot in Pontiac, Oakland county, Michigan, during her lifetime, and after her decease I give and bequeath the said property in Pontiac to her son, Francis Eugene Brooks.

Sixth. I give and bequeath to my daughter, Martha J. Brooks, the use of my farm, situated on the northeast quarter of section 19, in the said township of Troy, during her liftime, and after her decease I give and bequeath said property to Francis Eugene Brooks.

Twelfth. After the legacies and bequests hereinbefore mentioned are disposed of, settled and paid, I give and bequeath all of the remainder of my personal and real estate which I now have or may hereafter acquire as follows, to wit: The use of one-half thereof

Digitized by Google

I give and bequeath to my daughter, Anna E. Parks, during her lifetime, and after her decease I give and bequeath the said one-half of my said property to her children to be divided equally between them. I give and bequeath the use of the remaining half of all my said property to my daughter, Martha J. Brooks, during her lifetime, and after her decease I give and bequeath the said remaining half of my said property to her heirs.

Thirteenth. I hereby order and direct that in case of the death of any of my grandchildren before the time of receiving his or her share of my property as above specified, the share belonging to such deceased child or children shall belong to the brothers and sisters of such deceased child, to be equally divided between them, and in case of all the children of one of my said daughters shall die before the time of receiving their share of said property, then I order and direct that the said shares shall be given to the children of the other daughter, to be equally divided between them.

Fourteenth. I hereby order and direct that before any of the rents and profits of the lands hereby set apart to my daughters for their respective use that my executor or legal representatives shall first retain and pay the taxes out of such rents and profits upon the lands of the children of such daughters, and that my said executor shall see that no timber be cut upon such land while held for the grandchildren.

Anna E. Parks died February 26, 1903. Francis E. Brooks died December 5, 1907, while his mother, Martha J. Brooks, was yet alive and in the enjoyment of her life estate. She died March 25, 1914, about seven years after the death of her son. The fact that Francis E. Brooks died before his mother, who held the life estate to the property in question, is the event which gives importance to the deed sought to be set aside, which was obtained before his death by his father, defendant Eugene Brooks, from the children of the latter's wife's sister, Anna E. Parks, as the children of Anna E. Parks, but for said deed, would have be-

Digitized by Google

come fee owners of the Pontiac business property and Troy farm on December 5, 1907, entitled to possession and full enjoyment thereof on March 25, 1914, by happening of the contingency provided for in the concluding portion of paragraph 13 of their grandmother's will.

Defendant Eugene Brooks had entire charge of the estate for many years, its final settlement being deferred by provisions of the will. The beneficiaries apparently had full confidence in him, relied upon his judgment, and left its management entirely to him without interference.

Upon the death of Anna E. Parks in February, 1903, a partial distribution to her heirs followed under the provisions of the will, and at about the same time defendant obtained from them the quitclaim deed in question running to his son, who was then residing with his parents at Birmingham, apparently in good health, attending the Detroit Medical College as a student. Receipts for the legacies he then paid them are dated March 9 and 10, 1903, and the deed is dated March 9, 1903. This deed, covering the Pontiac store property and Troy farm, was carefully and skillfully drawn to cover their contingent remainder by a competent attorney of Pontiac whom defendant employed to prepare it. He then took it to his niece and nephews and obtained their signatures, himself acting as notary and signing the certificate of acknowledgment. It is undisputed that no consideration was paid, nor did anything of value ever pass to the grantors for signing this instrument. The circumstances of its execution and the representations by which he obtained complainants' signatures are matters in dispute which will be referred to later.

Not long after he had secured the deed, defendant negotiated with and sold the Pontiac property to Joseph S. Stockwell, the then judge of probate, for $8,000;

Digitized by Google

his son executing a deed of the same to said Stockwell. Defendant received from Stockwell $3,000 in cash and a $5,000 mortgage for the balance running to his son, which he at once caused to be assigned to the Polly Robinson estate, taking out of the estate $5,000 which he deposited to his own account—in effect, as administrator, buying the mortgage for the estate from his son, he himself, however, appropriating the money under the claim as made in court that the son then owed him. The health of his son failed, and he developed tuberculosis in the spring of 1904, going to Colorado at the close of college that year, continuing there and in Florida in failing health during most of the time until his death in 1907. Defendant testified that he advanced him money from time to time before and during his illness, amounting to as much or more than was received for this property, but whether he had at that time advanced him $3,000, or $4,000, or $5,000 he could not tell.

On March 2, 1906, the son, Francis Eugene, deeded to his father, defendant Eugene Brooks, the Troy farm for a stated consideration of $6,000. This deed was not recorded until October 2, 1908. The Troy farm had been charged up to defendant in the inventory of the Polly Robinson estate at $6,000 and so carried in the administrator's account until shortly after recording this deed to himself, when defendant deducted from the assets of the estate in his hands, amounting to $24,398, the sum of $6,000, thus reducing its assets for which he was accountable as administrator to about $18,000. Thereafter, with the record title of this farm in himself, he continued in control of it as owner until September 23, 1913, when he sold it to defendant Skrine and wife for $10,500, receiving $8,000 in cash and a mortgage for $2,500. It appears undisputed by these proceedings that all proceeds from the sale of both the Pontiac business property and the

Digitized by Google

Troy farm were appropriated, whether rightfully or not, by defendant Eugene Brooks during the time he was acting as administrator of the estate of Polly Robinson.

Austin R. Parks, one of the sons of Anna E. Parks, testified that he signed the deed in question understandingly, with full knowledge of its import and the contingent interest which he had in the property according to the will of his grandmother, and declined to join his brother and sister as complainants in this suit. Defendant Flora W. Martin was the wife of Francis Eugene Brooks, deceased, and is not shown to have any legal interest in this litigation.

The bill of complaint prays that the deeds of the Pontiac store property and Troy farm be set aside and canceled so far as complainants Polly E. Bray and Edgar A. Parks are concerned, if practicable, and, if it is disclosed this cannot be done, that defendant Eugene Brooks be decreed to account to complainants for their respective interests in the property and the proceeds thereof in accordance, as near as may be, with the provisions of their grandmother's will. It appeared upon the trial, and was ultimately admitted by complainants, that defendants Stockwell and Skrine were innocent purchasers of the respective parcels of property they had secured title to, for value and without notice of any infirmity in their chain of title or claim of fraud in procurement of the quitclaim deed in question, and therefore the deeds should not be set aside as to them.

The suit was heard on pleadings and proofs taken in open court, resulting in a decree that defendant Brooks account to complainants for their respective interests in the property and proceeds from the sale thereof, the details of such accounting to be determined by supplemental decree following the accounting, and

Digitized by Google

the bill was dismissed as to defendants Stockwell, Skrine, and Martin.

The quitclaim deed in controversy, dated March 9, 1903, was acknowledged by the grantors on March 14, 1903, according to the certificate of acknowledgment signed by defendant Brooks as notary. On its face the signatures of all the grantors appear to have been witnessed by defendant and Minnie T. Jarvis, an employee in the Exchange Bank at Birmingham, where defendant also worked as bookkeeper. It is undisputed that Austin Parks executed the deed in the presence of both witnesses and acknowledged it before defendant Brooks, who then went alone with the paper to complainants at their homes, where they signed it at his request, in his presence but not in the presence of Miss Jarvis. Edgar Parks and wife deny acknowledging it before defendant or any other notary, while Mrs. Bray states that she acknowledged it to her uncle in answer to his interrogation.

Complainants claim that at the time this instrument was signed by them in their respective homes at the request of defendant he led them to believe, or represented, that the property described in it was a part of their grandmother's estate, which went directly to their cousin Francis Eugene upon the death of his mother and would not belong to them under any circumstances; that the store property at Pontiac was sadly out of repair and had been condemned, requiring a large expenditure to put it in condition, and it was then desirable to get a clear title to the property so that it could be disposed of and Francis receive the benefit of his share as they just had of theirs upon the death of their mother; and that they signed the paper after learning their elder brother had done so, confiding in defendant and believing his representations, without any knowledge or understanding on their part that they were releasing anything of value

Digitized by Google

to them or any property that might some day become theirs, fully trusting in their uncle, who was then and had been for many years in charge of this property as administrator of their grandmother's estate; that they first learned they had released valuable interests in said estate which otherwise belonged to them under the provisions of their grandmother's will, after the death of their aunt, Martha J. Brooks, by whose life estate it was burdened, and about the time their uncle filed his final account in the probate court as administrator, asking its allowance and his discharge.

It is the claim of defendant that the matter of releasing complainants' interest in this property was first suggested by part or all of the children who signed it shortly after receiving their distribution; that he had the deed in question prepared by an attorney in Pontiac and presented it to them for execution, when they signed it freely without any persuasion or misrepresentation on his part, apparently with full knowledge and understanding of its import and nature.

Of the circumstances attending their signing the deed, as detailed by complainants, Edgar Parks testified, in part: That his uncle Eugene Brooks called at their home one day, saying he was in a hurry and did not sit down. He produced a paper which he did not read, but stated that as they had got their share, or were going to get it, it was no more than right that Frank should get something then, and he would like to have witness and his wife sign the paper, which was a release of the store and farm willed to Frank, so that he would have the benefit of the property, and he ought to have it if he was ever going to.

That he "said my brother and sister had already signed it, and he said it was all property that would never come to us anyway. * * * He said it was willed directly to Frank, and if Frank died it would go to him.

Digitized by Google

"*Q.* Did he explain why he wanted you to sign the paper?

"*A.* Nothing more than the store property had been condemned, and he said that it would take a great deal of money to repair it. * * * Well, I simply signed it because he asked me to. He told me it was on property that could never come to me; that it went direct; it was left direct to Frank."

That witness believed those statements, and, relying upon them, signed the paper without reading it, first learning he had signed a deed conveying a valuable interest in the estate after the death of his aunt in 1914.

Ella Parks, Edgar's wife, gave testimony to the same effect, stating Mr. Brooks said he was in a hurry and talked to them but a moment or two, stating he had a paper which he would like to have them sign, and laid it on the table, telling what property was described in it; that she understood the farm was left to Frank after his mother's death, and the store property also; that he stated each piece was worth about $5,000, and said he would not ask them to sign off all their rights to everything, but only on that property that went to Frank anyway; that she had never seen a paper of this kind before, but had perfect confidence in him, thinking he understood about the will and that it was all right, as he had been managing the estate for a time further back than she knew anything about; that the paper was something entirely new to her, as she had never heard of it before, and she did not know she was signing a quitclaim deed, but first learned that she had signed a deed containing valuable interests in the estate when Mr. Brooks was putting in his claim for part of the remainder before the probate court.

Polly Bray testified, in part, that she first saw the paper in her own house when her uncle Eugene first

Digitized by Google

brought it there at a time when no one was at home but herself, and asked her if she was willing to sign it so Frank would receive his share before his mother died, describing the two pieces of property to her, and that she did as he requested; that he "did not come to me at all and ask me about the paper until the day I signed it"; that everything was left to him to look after, and he had been trusted in the management of the estate, and she did not understand she was parting with anything of value which might some time come to her from the estate, but depended upon her uncle and relied upon his statements as to the paper.

Though denying that he made any misrepresentations, and testifying that complainants were fully advised by him of their rights under the will, when asked if, before the time of presenting the deed to complainants for execution, there had been any discussion to the effect that some day he would bring them a deed of this property to sign, Brooks replied:

"I don't recall whether I did or not, but I don't think so."

Asked if he ever told complainants that they would get nothing in the Pontiac property or Troy farm under any circumstances, he replied:

"Well, I might have said the probabilities were that they would not get anything in that property so long as my boy was in good health, and the prospects were that he would live longer than his mother."

In his version of what complainants said after he had given them their distribution, he quotes them, not as saying they proposed to part with any of their interest of value in the estate, but:

"That Frank should have his part of the property that his grandmother willed him, and not have to wait until his mother died until he got it * * * That Frank should have that real estate that his grand-

Digitized by Google

mother willed him, and what his grandmother willed him."

We are impressed, as was the trial judge, that the testimony of defendant Brooks, considered as a whole, in the light of the undisputed facts and circumstances, is far from satisfactory and convincing; and are not prepared to disagree with the court's conclusions that:

"His manner of giving it and his memory or lack of memory are such that I am unable to believe a considerable part of the vital portions of it. * * * If he did not actually misrepresent the contents and character of Exhibit A (the deed), he told them as little as possible and secured their signatures."

It is urged in behalf of defendant Brooks that he was not a trustee of the property belonging to the estate which he was administering and did not occupy such fiduciary relations towards complainants as to in any way prevent him from acting as agent for his son in perfecting his title to this property, or afterwards receiving the proceeds of its sale or taking title to it from his son in payment of debts the latter owed him; while it is contended for complainants that, by reason of his official position as administrator of the estate, he was at all times acting in a fiduciary capacity and held such confidential relations with complainants as to preclude him from acquiring, directly or indirectly, interests in property of the estate adverse to theirs, or which would tend to defeat their rights as provided by the terms of their grandmother's will.

It is undoubtedly the law that defendant Brooks cannot, by reason of being the administrator, be classed in a technical sense as the trustee of this estate holding legal title to it and primary use of it in trust for the benefit of another; but, in a broader sense of the expression as commonly understood and as recognized by courts of equity in considering duties and

Digitized by Google

responsibilities of one situated as he is shown to have been, his control of this estate involved fiduciary, confidential trust relations between him and complainants. By whatever name it may be best expressed, the principle applicable to such a situation is thus clearly stated in *Keech* v. *Sanford*, 1 W. & T. Eq. Cas. (4th Am. Ed.) 44, 62, which was quoted with approval in *Trice* v. *Comstock*, 121 Fed. 620 (57 C. C. A. 646, 61 L. R. A. 176), by Judge Sanborn:

"Wherever one person is placed in such a relation to another, by the act or consent of that other, or by the act of a third person, or of the law, that he becomes interested for him, or interested with him, in any subject or property or business, (he is in such a fiduciary relation with him that) he is prohibited from acquiring rights in that subject antagonistic to the person with whose interests he has become associated."

In considering the situation presented by this record, strict rules of law touching parties dealing at arm's length are of scant application. Defendant Brooks is far older than complainants, of a generation preceding theirs, and their uncle by marriage. They had known him from their childhood in the associations and confidence of kinship. They all resided in the same town, where the grandmother of a yet preceding generation had resided, and died many years before leaving an estate tied up by a somewhat lengthy and complicated will in the details of deferred administration and contingencies, but by its general scheme and most readily understood provisions dividing the estate between her two daughters for life, after which it was to go to their children or heirs. So long as the two daughters lived, none of the grandchildren was given any legal participation in the use and enjoyment of the estate. So long as either lived, the estate could not be closed, and its executor or administrator was charged with certain duties in respect to conserving it. Since 1892, when appointed as admin-

Digitized by Google

istrator with the will annexed, those duties rested upon defendant Brooks. Through all those years he had full charge and control. Complainants were not consulted as to its management, so far as shown, nor informed in regard to the details. They had confidence in, relied upon, and fully trusted him without question until their aunt, his wife, died in 1914. Shortly after their mother died, in 1903, and he had distributed to them several thousand dollars each from their grandmother's estate, he went to them with a personal appeal for their signatures to a paper which, as they were led to believe, was necessary to let their cousin Frank come into the immediate enjoyment of a portion of the estate which they supposed ultimately would be his, and which their uncle stated would never go to them under any circumstances. That they would and did rely upon him, believed what he said, and did what he asked, seems but natural and beyond reasonable doubt. What he said to them and they to him at that time are matters in dispute, with the preponderance of evidence, we think, in favor of their contention; but significant things which he did in that connection and the results are not in dispute.

At this opportune time he journeyed to Pontiac and employed an able attorney to draw up this deed to his son, which he had properly executed and witnessed at the bank by Austin, the older brother, who states he had talked it over with his uncle before and fully understood just what he was doing. He then went with it to the homes of complainants and procured their signatures when no one else was present. On its face it appeared to have been executed by all in the presence of two witnesses and duly acknowledged. Such in fact was not the case, and he knew it. As to complainants it was not entitled to record. It would undoubtedly have been equally good as a common-law deed between the parties without witnesses or ac-

Digitized by Google

knowledgment, and the irregularity is only material in its significance as to his conduct. He was a notary, a business man of experience in conveyancing, knew two witnesses were required to the execution of a deed, and provided them for Austin's signature at the bank, but, with the instrument so prepared that it would appear regular, secured the signatures of complainants when he was alone with them. He promptly had this deed recorded and sold the Pontiac store property, for $8,000, to the judge of probate in whose court he was acting as administrator of this estate, receiving $3,000 in cash and a mortgage of $5,000, which he, as agent of his son, cashed by selling it to the estate, for which he as administrator purchased it. During this time his son was a student in college, married, dependent upon his father, and, as the latter testifies, heavily indebted to him. There is no evidence that the son ever spoke to or communicated with complainants on the subject, or requested his father to act as agent for him in procuring this deed, made any suggestions or gave any directions as to what he desired done, or in any manner took part in the proceedings beyond signing such papers as his father prepared and presented to him. Asked if he had consulted his son with reference to his part in the proceeding before he carried it out, defendant answered, "I think I did." His reason for withholding the deed of the Troy farm, given him by his son, from record for two years and until after his son's death, was "pure carelessness on my part." Asked why, at the time he recorded the deed, he deducted from the amount of property which belonged to the estate the $6,000, he answered:

"I had no reason, only I wanted to sell the place at that time, and advertised it for sale."

He sold the place for $10,500, giving the grantees a deed with an expressed consideration of $1. That he,

Digitized by Google

though ostensibly acting as agent for his son, was personally, if indirectly, interested in securing this deed from complainants, seems clear; and it is undisputed that, as a result of his activities as agent for his son, he personally, while administrator of this estate, realized the sum of $18,500 as proceeds from the sale of property which, but for the deed, would by their grandmother's will have gone to the children of Anna Parks. It cannot successfully be denied that in these transactions he, while in a position demanding official impartiality as administrator of this estate, placed himself in relations which ordinarily excite a conflict between self-interest and integrity.

It is urged that complainants' rights are cut off by laches resulting from delay. With this view we cannot concur. Laches does not necessarily grow out of a mere lapse of time. Complainants' rights in and to this property were prospective and contingent. They were not enforceable until the happening of subsequent events. The possession and use of the property belonged to their aunt during her life. Shortly after her death, they first learned the full significance of the paper they had signed and of their rights under the will, after which this suit was promptly begun. Laches rests chiefly on the inequity of permitting a claim to be enforced by reason of changed conditions or relations of the property or parties resulting from delay. Here the delay has worked no wrong or changes, prejudicial to him, in the relations between complainants and defendant Brooks.

It is urged that complainants claimed ignorance of their rights, and execution of this deed through misapprehension of its import, under their contention, amounted at most to but ignorance of the law, or of their legal rights, which is no defense, and against which stands presumptive knowledge and notice by reason of the will and their deed, both of public record.

Digitized by Google

In that connection, as applied to this case, the equitable considerations of fraud and mistake are allied. The general rule that ignorance of the law excuses no one, and a mistake in a matter of law is no protection, is common to all systems of jurisprudence. This rule is without exception as applied to the general laws of the country and one's rights or duties as defined by them, but as to strictly private rights under special conditions, involving exceptional cases within equity jurisdiction, it was long ago said:

"If a man, through misapprehension or mistake of the law, parts with or gives up a private right of property, or assumes obligations upon grounds upon which he would not have acted but for such misapprehension, a court of equity may grant relief, if, under the general circumstances of the case, it is satisfied that the party benefited by the mistake cannot in conscience retain the benefit or advantage so acquired. * * * If the mistake of law, or as to his private right, be that of one party only to a transaction, it may be either that the mistake was induced or encouraged by the misrepresentation of the other party, or that, though not so induced or encouraged, it was known to and perceived by him, and was taken advantage of, or it may be that he was not aware of mistake. Whatever may be the circumstances of the case, a court of equity may, under the peculiar circumstances of the case, grant relief. But if it appear that the mistake was induced or encouraged by the misrepresentation of the other party to the transaction, or was perceived by him and taken advantage of, the court will be more disposed to grant relief than in cases where it does not appear that he was aware of the mistake." Kerr on Fraud and Mistake, pp. 398, 400.

Under this exception it has been held that where a sister, being ignorant of her rights under a settlement, released them to a brother, the release was not binding. *Ramsden* v. *Hylton*, 2 Ves. 304. *Vide*, also, *Jordan* v. *Stevens*, 51 Me. 78 (81 Am. Dec. 556); and

Digitized by Google

Trigg v. *Read*, 5 Humph. (Tenn.) 529 (42 Am. Dec. 447), where the subject is exhaustively discussed.

It is further urged that, as the case now stands, complainants' bill is but one "for an accounting for damages for an alleged tort," which a court of chancery cannot entertain, as their claim involves no series of transactions between the parties concerning mutual demands and they have an adequate remedy at law. As a general rule, equity courts may compel an accounting where fraud is charged, or fiduciary relations exist. 4 Pomeroy's Equity Jurisprudence, § 1421.

This bill was primarily filed to set aside, and for relief from, an instrument under seal valid upon its face, purporting to convey title to real estate claimed to have been procured through false and fraudulent representations, and undue advantage taken by one in a position of trust and confidence towards complainants, a subject peculiarly within equity jurisdiction. That the intervention of innocent parties prevented the court from restoring title to complainants, and granting the full relief asked for as to all defendants, did not divest the court of jurisdiction to grant partial relief against the culpable defendant who availed himself of confidential relations to practice the imposition. Chancery courts have general supervisory power not only over trustees and strictly trust estates, but that power extends to authority to correct breaches of trust and fraudulent conduct on the part of all persons occupying relations of special trust and confidence with others. Grounds of equitable jurisdiction having been alleged and proved, a court of chancery may retain jurisdiction to fully dispose of the matter in its related issues.

"In such cases it is not necessary that the accounts should be mutual, or complicated, or that the bill should be framed for discovery, and it is no objection that an action at law sounding in damages may be brought

Digitized by Google

for the breach; the legal and equitable remedies are concurrent, and complainant has his election." 1 C. J. p. 622.

For the foregoing reasons, the conclusions reached by the trial court are approved, and the decree there rendered is affirmed, with costs to complainants.

BROOKE, C. J., and KUHN, STONE, OSTRANDER, BIRD, and MOORE, JJ., concurred.

The late Justice MCALVAY, who sat in this case, took no part in this decision.

DARROW *v.* MINNEAPOLIS, ST. PAUL & SAULT STE. MARIE RAILWAY CO.

1. TAXATION — TAX HOMESTEAD LANDS — STATE — TITLE — DEEDS —EVIDENCE—PRESUMPTIONS—BURDEN.

   A deed from the State land commissioner, conveying to plaintiffs certain real property as tax homestead lands under section 127 of the tax law and under Act No. 211, Pub. Acts 1905 (1 How. Stat. [2d Ed.] §§ 1898, 2021), being in the usual form and reciting facts sufficient to show compliance with the statute, made a *prima facie* case of title in the grantee of the State who purchased the homestead property pursuant to law.

2. SAME—OCCUPATION—RAILROADS—ABANDONMENT.

   After six months from the date of recording the conveyance from the auditor to the State, its recitals of the finding and determination of the auditor general and State land commissioner that lands deeded to the State under section 127 of the tax law as tax homestead lands were unoccupied and abandoned lands became conclusive, notwithstanding that the examiner's report in the records of the land office showed that the lands were occupied:

Digitized by Google

Act No. 84, Pub. Acts 1903, fixing a limit after which the validity of such deeds to the State may not be questioned. See 1 How. Stat. (2d Ed.) § 2060.

3. SAME.

Containing recitals of facts sufficient to warrant the State officials in classifying such lands as State homestead lands, the conveyance was not open to attack as not fair on its face. The finding of the auditor general and land commissioner that the land was unoccupied or abandoned was not void because conflicting with the report of the examiner, since their finding is not necessarily based on the conclusion of the latter officer.

4. SAME—LIMITATION OF ACTIONS—POSSESSION.

The fact of possession or occupancy by the owner did not operate to take the case out of the statute of limitations, and was not a reason for holding the provisions of law inapplicable on constitutional grounds. The owner had lost his rights by permitting the lands to be returned and sold for taxes, and was not entitled to hold possession.

ON REHEARING.

5. SAME—CONSTITUTIONAL LAW—DEEDS—LIMITATION OF ACTIONS—MISTAKE—DEFENSES.

Though the premises affected by the action of ejectment were in part occupied and used by defendant for station grounds, the deed issued to the State by the auditor general was fair upon its face, was recorded, and the statute of limitations (Act No. 84, Pub. Acts 1903) began to run; and the defense that the auditor's deed to the State was based upon a finding contrary to the report of the examiner, and contrary to the facts, or was the result of a mistake, is not available after the six-month period fixed by the statute has expired.

Error to Delta; Flannigan, J. Submitted June 20, 1913. (Docket No. 110.) Decided October 2, 1914. Resubmitted June 8, 1915. Former opinion reaffirmed July 21, 1916.

Ejectment by John Darrow and others against the Minneapolis, St. Paul & Sault Ste. Marie Railway

Digitized by Google

Company. Judgment for defendant upon a directed verdict. Plaintiffs bring error. Reversed.

A. H. Ryall, for appellants.

Frank D. Mead, for appellee.

BIRD, J. Plaintiffs brought an action of ejectment to recover from defendant the possession of lots 9 and 10 of block 6 of the village of Rapid River, in Delta county. The defendant acquired the title thereto by warranty deed on September 29, 1896. The lots were bid in by the State for unpaid taxes for the years 1897 to 1906, both inclusive. On April 29, 1910, the auditor general deeded the lots to the State, pursuant to section 127 of the tax law (Act No. 206, Pub. Acts 1893, 1 How. Stat. [2d Ed.] § 1898), which placed them in the list of tax homestead lands. This deed was recorded in Delta county on May 25, 1910. Subsequently they were released and sold to plaintiffs by the land commissioner on December 5, 1910. The plaintiffs made their case by introducing their deed in evidence. The defendant denied the validity of the deed, and offered in evidence certain records of the auditor general's office, which showed the report of the State land examiner to be as follows: "Owned by Soo Railway Company. Occupied by section foremen." In view of this report, it was defendant's contention that the auditor general had no jurisdiction to deed the lots to the State; that the deed was not fair on its face, and that the short statute of limitations (Act No. 84, Pub. Acts 1903 [1 How. Stat. (2d Ed.) § 2060]) did not apply to defendant. From a directed verdict for the defendant, plaintiffs bring error.

1. The deed from the land commissioner to the plaintiffs was in the usual form, and its recitals showed a compliance with the law. The introduction of it in evidence made a *prima facie* case for the

Digitized by Google

plaintiffs under the provisions of Act No. 211, Pub. Acts 1905 (1 How. Stat. [2d Ed.] § 2021). *Griffin* v. *Kennedy*, 148 Mich. 583 (112 N. W. 756); *Beuthien* v. *Dillon*, 160 Mich. 396 (125 N. W. 363); *Chiodo* v. *Williams*, 180 Mich. 367 (147 N. W. 492).

2. Conceding that the records of the auditor general's office disclose that the finding of the auditor general and land commissioner as to the occupancy of the lots was opposed to the finding of the examiner, was this defense open to defendant, unless made within the time allowed by the statute? We think not. The statute has fixed a period within which the validity of such deeds may be questioned, and that time is within six months after the deed from the auditor general to the State is filed with the register of deeds in the county where the lands are situate. Act No. 84, Pub. Acts 1903. The defendant having failed to embrace this opportunity, it is now precluded from doing so.

But it is argued that the deed is not fair on its face, and therefore the statute of limitations never commenced to run. The deed recited that:

"Whereas, the auditor general and the commissioner of the State land office have caused an examination of said lands to be made as provided in section 127 of Act 206 of the Public Acts of 1893, as amended by Act 107 of the Public Acts of 1899, and a certificate having been filed by the examiner showing said lands to be abandoned, and the auditor general and the commissioner of the State land office having found and determined that said lands have been returned and bid off to the State as above described; that they are abandoned, that no suit is pending in the county where said lands are situated to set aside the taxes or any of them on said lands or to remove the cloud occasioned thereby, and that no application has been made to pay said taxes or to purchase or redeem said lands."

It is said in *Fitschen* v. *Olson*, 155 Mich. 320 (119 N. W. 3), that:

Digitized by Google

"The mode of determining whether a deed is void upon its face 'is to test the deed by making a reference to the authority recited in it for making the sale, in connection with the act giving the auditor power to sell. When the sale is found not to be in accordance with that power, the deed is void upon its face, because the action of the auditor is illegal, and the law presumes it to be known to a purchaser.'"

Had the plaintiff followed this rule and had recourse to the law and records, he would have found that the auditor and land commissioner had the power to make the determination, and that they had made it, and determined that the lands were unoccupied and abandoned. Had he continued his investigation, he would have also found that the examiner reported the lots were owned by the defendant and occupied by the sectionmen, but he would have found no provision of law requiring the auditor general and land commissioner to make a finding or classification in accord with such report. Whether the finding of the auditor general and land commissioner should have been in accord with the finding of the examiner is a legal question, which the purchaser would not be presumed to decide at his peril. For these reasons we do not think we should hold that the deed was not fair on its face.

It is further contended that the statute of limitations (Act No. 84) does not apply to an owner in possession. The construction which has been placed by this court upon that statute is that the defendant by reason of its failure to pay its taxes, and by reason of its failure to redeem its premises from sale, has lost its rights to the State, and therefore, not being entitled to the right of possession, the law deems it has no legal possession. This question was fully discussed and considered in *Griffin* v. *Kennedy*, 148 Mich. 583 (112 N. W. 756), wherein it was said:

"Said section 127 provides that the determination heretofore mentioned shall be conclusive unless it is

Digitized by Google

assailed by suit within six months. As applied to this case, this provision required the defendant in possession to commence suit against an adverse title. This circumstance does not, in my judgment, render the provision unconstitutional under the principle recognized and applied in *O'Connor* v. *Carpenter*, 144 Mich. 240 [107 N. W. 913]. That principle is this:

"'One who is himself in the legal enjoyment of his property cannot have his rights therein forfeited to another for failure to bring suit against that other within a time specified to test the validity of the claim which the latter asserts, but takes no steps to enforce.' Cooley on Constitutional Limitations (6th Ed.), p. 449.

"That principle preserves the rights of the one in possession. It applies only where he has rights. In this case defendant in possession had no rights, and therefore the principle has no application."

Our conclusion is that plaintiffs' deed made a *prima facie* case, and, as the proofs stood at the close of the trial, they were entitled to a directed verdict.

The judgment of the trial court is reversed, and a new trial ordered.

MCALVAY, C. J., and BROOKE, KUHN, STONE, OSTRANDER, MOORE, and STEERE, JJ., concurred.

ON REHEARING.

BIRD, J. The application for a rehearing in this case brought to our attention the statement that the lands involved herein were used by defendant in the operation of its railway. Fearing lest we had overlooked this point, we granted the application for a rehearing. Upon the rehearing it was pointed out by plaintiffs' attorney that this ground of relief was not raised by the defendant, either upon the oral argument or in its briefs in this court, and therefore could not, under the rule, be considered on rehearing, citing in support thereof *Hutchins* v. *Kimmell*, 31 Mich. 126 (18 Am. Rep. 164); *Smith* v. *Walker*, 57 Mich. 456

Digitized by Google

(22 N. W. 267, 24 N. W. 830, 26 N. W. 783); *Nissly* v. *Railway Co.*, 168 Mich. 676 (131 N. W. 145, 135 N. W. 268, Am. & Eng. Ann. Cas. 1913C, 719). Inasmuch as the validity of the taxes was not questioned, we think this point not material.

In considering the question as to whether the deed from the auditor general to the State was fair on its face, it was said, among other things, in the opinion, that had the plaintiff investigated "he would have found that the auditor general and land commissioner had the power to make the determination, and that they had made it, and determined the lands were unoccupied and abandoned." It is insisted that this statement is not in accord with the record, because the examiner's report (which was by reference made a part of the order of determination) stated that the lots were owned by the "Soo Railroad" and occupied by section foremen. Notwithstanding this statement, the auditor general and land commissioner found that the lots were subject to the provisions of section 127 of the tax law (Act No. 206, Pub. Acts 1893), and in pursuance thereof they were deeded to the State by the auditor general, and the land commissioner afterwards deeded them to the plaintiffs. These deeds were in regular form and contained the recital that the lots had been determined to be unoccupied and abandoned. Nothing appears upon the face of either deed to give plaintiffs notice that they were or might be irregular in any respect. The law makes these deeds *prima facie* evidence of title. Act No. 211, Pub. Acts 1905. Had defendant attacked the validity of the deed from the auditor general to the State within six months from the date of the recording thereof, the defects relied upon would have been available as a defense. Act No. 84, Pub. Acts 1903. Not having done so, it was precluded from making that defense. *Griffin* v. *Kennedy*, 148 Mich. 583 (112 N. W. 756). See, also, *Beuthien*

Digitized by Google

v. *Dillon*, 160 Mich. 396 (125 N. W. 363); *Chiodo* v. *Williams*, 180 Mich. 367 (147 N. W. 492).

The judgment of the trial court is reversed, with costs to the plaintiffs.

STONE, C. J., and KUHN, MOORE, STEERE, BROOKE, and PERSON, JJ., concurred with BIRD, J.

OSTRANDER, J. (*concurring*). Former rulings of this court require us, in my opinion, to reach the conclusion announced by Mr. Justice BIRD. It should be stated, however, in order that the scope and effect of the decision may be properly understood, that the auditor general and land commissioner did not determine that the premises here involved were abandoned, but, on the contrary, they expressly found, as the examiner reported, that the premises were occupied. Plainly, a mistake was made when, after such a determination, the auditor general proceeded to deed the premises to the State. But, as is stated by Mr. Justice BIRD, the deed is fair on its face, it was recorded, and the applicable and invoked statute of limitations began to run. The passing of the period fixed by the statute has left defendant without remedy for the mistake referred to. It should be stated, also, that upon the trial the defendant offered testimony tending to prove that the land was not only occupied at the time it was deeded to the State as abandoned land, but was used by the defendant as a part of its station grounds. The auditor general thereafter, but at a time when it is conceded his action would not be effectual, issued a certificate of error.

For reasons assigned by a majority of the court in *Griffin* v. *Kennedy*, 148 Mich. 583 (112 N. W. 756), I concur in reversing the judgment.

STONE, C. J., and KUHN, MOORE, STEERE, BROOKE, and PERSON, JJ., concurred with OSTRANDER, J.

Digitized by Google

RISBRIDGER *v.* MICHIGAN CENTRAL RAILROAD CO.

1. RAILROADS — PERSONAL INJURIES — MASTER AND SERVANT — LICENSEES.

   Decedent was an employee of the defendant railroad company. He was accustomed in going to his work to travel along the right of way of defendant, a route which the public was accustomed to follow. Other servants of the company likewise made use of the tracks as a path to and from its shops. A freight train of the railroad company passing at this point about 5 o'clock in the morning, when it was dark and foggy, with the engine backing at the forward end, the tender in front, and having no light displayed, ran down decedent, who was not seen by any of defendant's employees and who was fatally injured. *Held*, on rehearing, that in operating trains over a part of the right of way which was used by employees as a footpath, defendant was under no legal obligation to display lights and to sound the statutory signals for a crossing.

2. SAME—YARD LIMITS—TRESPASSER—DUTY TO WARN.

   Held, that the additional fact, not adverted to in the first, or original, holding in this case, that plaintiff's intestate was inside the cattle guard situated at the crossing and was within the yard limit of defendant railroad company, furnished further reason for denying any right of recovery to the estate.

3. SAME—YARDS—OBLIGATION.

   It being impracticable to prevent trespassing upon railroad tracks enclosed by a cattle guard, a trespasser takes the risk of any resulting injury; the company owes no more strict duty than not to wilfully or wantonly kill or injure him.

4. SAME—LICENSE.

   And even if decedent should be considered a licensee upon the right of way, he had no ground or right to expect that the corporation would forego its reasonable and ordinary use of the tracks.

---

[1]Generally as to duty of railroad company to keep lookout for trespassers on tracks, see notes in 25 L. R. A. 289; 8 L. R. A. (N. S.) 1069, 1076; 41 L. R. A. (N. S.) 264; particularly as to speed, 11 L. R. A. (N. S.) 352.

Digitized by Google

Error to Jackson; Parkinson, J. Submitted May 1, 1914. (Docket No. 24.) Decided April 19, 1915. Rehearing granted. Resubmitted January 19, 1916. Original opinion reversed and judgment affirmed March 30, 1916. Rehearing denied September 27, 1916.

Case by Ada E. Risbridger, administratrix of the estate of Chauncy E. Risbridger, deceased, against the Michigan Central Railroad Company for the unlawful killing of plaintiff's decedent. Judgment for defendant upon a directed verdict. Plaintiff brings error. Affirmed.

Price & Whiting, for appellant.

Wilson & Cobb (*Henry Russel* and *Frank E. Robson*, of counsel), for appellee.

MCALVAY, J. Plaintiff, as administratrix, brought suit against defendant to recover damages on account of injuries to her husband which resulted in death, claimed to have been caused by the negligence of defendant. Upon the trial, when plaintiff rested her case, the court, upon a motion to that effect made by defendant's counsel, directed a verdict in favor of defendant and against the plaintiff, upon which a judgment in due form was duly entered. Plaintiff brings error.

The material assignments of error necessary to be considered relate to the action of the trial court in directing a verdict for defendant. In reviewing a judgment on a verdict directed for defendant, this court considers the testimony in the light most favorable to the plaintiff. The case made by plaintiff tended to show the following facts:

The injury occurred in the city of Jackson, where at the time plaintiff's decedent was an employee of

Digitized by Google

defendant, and had been so engaged for a week and a half as a car repairer in its junction shops in said city. The plaintiff's decedent, with his family, lived on High street, in the southwest part of the city. The junction shops were located northeasterly from said street at a distance of more than one mile, and between High street and the shops the right of way and tracks of defendant's railroad extend continuously. At these shops defendant employed a large force of men. Many of these workmen, who lived in the southwestern part of the city, had been in the habit for many years of going to their work in the morning and returning at night along defendant's track. It was a good smooth footpath all the way, and where it crossed the river the bridge was covered over solid.

Plaintiff's decedent, also, during the time of his employment, went to and from his work along these tracks of the company, having been accompanied the first two mornings by an old employee of defendant, who was his next neighbor. Many people not in defendant's employment also frequented these tracks, going back and forth along them on foot. Such use of these tracks by workmen and others was well known by the employees of the company and the crew of the train which struck and killed Mr. Risbridger. The deceased was 53 years of age, in good health, and of good habits. He had no experience in railroad work prior to this employment. This accident occurred between 5 and 6 o'clock in the morning of November 16, 1910, when the deceased and others of defendant's employees at the junction shops were on their way to their work walking along these tracks.

There were no eyewitnesses to the accident. Decedent's body was found along defendant's right of way about 75 feet northeasterly from Belden street. He had left the house to go to his work about 5 o'clock that morning, which was dark and foggy, and had

Digitized by Google

arrived at the place where he was killed before daylight. On that morning a gravel train, consisting of a very powerful locomotive and tender, 75 empty flat cars, and a caboose, of a total length of more than 3,000 feet, started from the Junction to go to Colon, a distance of 55 miles, on the Air Line Division of defendant's road. The engine which pulled this train was backing up with the tender piled high with coal. Proceeding westerly in this manner, the back end of the tender was the front end of the train.

It is admitted that there was no headlight upon the back end of this tender as it proceeded. On the part of plaintiff, testimony was introduced tending to show that there was no light of any kind upon the rear end of the tender, and that this engine did not whistle or ring its bell. The crew of this train consisted of a conductor, who was riding in the engine on the fireman's side, the engineer and fireman, who were also in the locomotive cab, the head brakeman, who was stationed on top of the coal on the tender for the purpose of exchanging signals with the rear brakeman by means of his lantern, and to know that the train was all right, and the second brakeman, who was back toward the rear of the train.

There are two tracks on this right of way, running parallel with each other, which are used as double tracks. The south track belonged to the Lake Shore & Michigan Southern Railway Company, and the north track, being the one upon which Risbridger was claimed to have been killed, belonged to the defendant. In the operation of the road all trains moving to the east take the south track, and all trains moving to the west take the north track. Deceased was found while it was still dark by Alfred De Fresna, a switchman in defendant's employ, on his way to work. He was lying with his head near the south rail of the west-bound track, his legs extending diagonally towards the east

Digitized by Google

track. His hat and dinner pail were on the ground near him. One foot was cut off between the knee and the ankle, entirely separated. Another man named Kimball, also employed by defendant, arrived at this place about the same time. These men undertook to do something for deceased and found that he was still alive. He revived when moved slightly, and said only a few words about being cold and wanting his hat, and then expired. De Fresna, as soon as he arrived there, ran to the signal tower, which was about a block northeasterly from the place where the body was found, for the purpose of having the towerman telephone for an ambulance, which he did, and the ambulance arrived soon after.

None of the crew of this gravel train saw any one on the track that morning, or knew that the train had struck a man, until they arrived at Colon, their destination, when the conductor received such information by telegram from the superintendent. There was testimony in the case presented by plaintiff tending to show that there was considerable blood found on the forenoon of the day on which the accident occurred on the ties and south rail of the defendant's track at the place where the accident occurred. It also appears without dispute that, at the same time this gravel train going west passed the place where the accident occurred, a freight train passed going east toward Jackson on the south track.

There is no dispute in this record but that along these tracks the entire distance down through this railway yard the employees of defendant and all persons who desired had for many years used these tracks on their way to their work in defendant's junction shops, or wherever they might be going, as a footpath, and this was well known to the employees of defendant who operated trains over the tracks.

The errors assigned by appellant which we will con-

Digitized by Google

sider relate to the charge of the court as given to the jury in granting defendant's motion to direct a verdict, which was to the effect that defendant owed no duty toward plaintiff's decedent, because he was a trespasser walking along the tracks of defendant's road; that he assumed all risks in using such tracks as a way to walk upon for his own convenience or purposes, his being upon the track not having been discovered at the time by the employees of defendant. Taking this case made by plaintiff as epitomized, it must be admitted that such a case was presented as entitled plaintiff to have it submitted to the jury, unless, taking the facts as true, we find that no recovery could be had by reason of some well-settled rule of law.

We find from the facts stated that for many years the employees of defendant, the employees of others along this track, and citizens had used these tracks as a footpath going to and from their work, or for their personal convenience. The record is clear that this was known to defendant's employees. The crew who operated the gravel train in question were acquainted with the fact that such a custom existed. It follows that defendant company must be charged with knowledge of such a custom. This custom had grown up in a thickly populated city of considerable size. These tracks had become a footpath for the general public, which use had continued for years with the knowledge of defendant, without even posting notices prohibiting it. The inference follows that it consented to such use.

Under these circumstances, it would seem that there should rest upon defendant some duty, at least of reasonable care, owed by it toward these people whom it had permitted to make such use of its tracks. When this accident occurred, defendant must be held to have expected that the tracks were being used, as they had been used for years, by individuals on their way to

Digitized by Google

work, or about their business. It would seem that the law should impose a duty upon defendant to use reasonable care in operating trains along these tracks in the darkness on that morning, where it would be reasonably expected persons were using them for a footpath. The rule laid down by the trial court is that plaintiff's decedent on these tracks, being a trespasser, must take his chances; that defendant owed him no duty of care whatever. Admitting that such a rule is applicable in some cases, under the circumstances of this case it appears, to say the least, to be extremely harsh.

It is admitted that there was no headlight on this train. There is testimony tending to show that there was no light of any kind upon the rear of this tender, which was the front end of the train. There was no lookout, and, had there been one, there was not sufficient light to show the tracks ahead of the train. There is also evidence tending to show that no whistle was blown or bell rung. It is contended by defendant that the evidence shows there was an ordinary hand lantern on the end of the tender and that the whistle was sounded and the bell rung. These were questions of fact for the jury, if material. The speed of the train was from 9 to 15 miles an hour. The city ordinance prohibited a greater speed than 6 miles an hour.

The exact question involved in the instant case is one of first intention in this court. We find, however, that there are authorities which hold that, under facts similar to those presented here, persons so using the track of a railroad company as a footpath are regarded as licensees, and that trains at such places must be operated with this knowledge in mind, which calls for the exercise of reasonable care. We quote from an accepted authority as follows:

"As a general rule, the fact that a railroad company allows the public to pass constantly on or over its

Digitized by Google

tracks with knowledge of the custom warrants the inference that it consents to the use, so that a person so using the track is regarded as a licensee, and trains must be operated with this knowledge in mind, and this calls for the maintenance of a lookout, the giving of timely warning, and the keeping of the engine under proper control. The care demanded in this situation is reasonable care. The test is whether there has been such use of the track as a footpath as to support reasonable grounds to the operatives of the train upon such a track to anticipate the presence of persons on or so near the railroad track as to endanger them. And for the purpose of this rule it makes no difference that the railroad company has posted signboards warning people not to trespass on the right of way. The rule requires engines to be operated at such places with lighted headlights at night." White's Supplement to Thompson on Negligence, vol. 8, § 1725, and cases cited.

In our opinion, the rule laid down by the foregoing authority is a reasonable one, and it cannot be considered as a departure from the former decisions of this court. It is but an application of the principle frequently applied that from acquiescence in a course of conduct for an extended time duties and obligations arise. To hold in the instant case that the years of acquiescence upon the part of defendant to the use of its tracks in the manner stated created no duty of a reasonable care on the part of defendant toward these licensees would be contrary to both reason and authority. Our conclusion is that the trial court was in error in directing a verdict for defendant.

The judgment of the circuit court is reversed, and a new trial ordered.

BROOKE, C. J., and KUHN, STONE, OSTRANDER, BIRD, MOORE, and STEERE, JJ., concurred.

ON REHEARING.

BROOKE, J. Counsel for appellee criticise the statement of fact contained in our former opinion in this

Digitized by Google

case. Certain inaccuracies and omissions do appear, which, though not controlling, may be noted as follows: The speed of the train, instead of being from 9 to 15 miles, was not to exceed 10 miles an hour. The only evidence to the contrary was given by the witness Snyder, who said:

"Well, now, I ain't a very good judge of trains, but I should think it was running close to 15 miles an hour."

Upon cross-examination he testified:

"I don't claim to be able to judge the speed of trains; have had no such experience in railroading as to enable me to judge on that. I don't claim my judgment on that subject is reliable."

As to whether or not the forward end of the train, which was the tender of the engine, was protected by a light, the record discloses that two witnesses, whose duty it was to see that an ordinary white light (railroad lantern) was in place upon the tender while backing, gave positive testimony to the effect that the light was burning at the beginning of the trip at the Junction, and that it was burning brightly at the first stop some four miles west. The witness Snyder testified repeatedly that no light of any kind appeared upon the train. Upon cross-examination, however, he gave the following testimony:

"*Q.* I am talking about on the outside of the train.
"*A.* I didn't see any.
"*Q.* I know you didn't see any; I want to know if you will say positively under oath that there were none?
"*A.* I would say I didn't see any.
"*Q.* Of course you would. Would you say positively they were not there?
"*A.* No; they might have been there. I didn't see any."

Two witnesses swore positively to the blowing of

Digitized by Google

the whistle at the crossings and to the constant ringing of the automatic bell. The witness Snyder testified as follows:

"I heard no whistle on that train, and no bell; even after I got out on one side, I didn't hear any bell ringing."

In our former opinion it was said that there was no lookout. Plaintiff's witness Platt (examined under the statute) testified that he got up on top of the tank near its forward end with his lantern. He said:

"I went up on the tank in the performance of my duties that morning. I got up there to ride my train over the interlocker—to watch for your train, see everything is all right, the signals are all right, go up there as a lookout. * * *

"*Q.* You weren't watching ahead that night for anything on the track?

"*A.* If there had been anybody on the track ahead of me, that is, within range of a lantern we had set up there—I covered this territory where this man was struck or was supposed to be hit by our train—I would have seen him. * * * I naturally was looking ahead."

This witness further testified that he continued in this position until he passed the Belden road, which would carry him beyond the point where plaintiff's decedent was killed. The record contains no evidence tending to show that defendant's railroad track was graded or ballasted in any other manner than was necessary for its proper maintenance; or, in other words, there is nothing in the record to indicate that the defendant maintained its track "as a good smooth footpath" at the point in question, unless the same could be said of any similar piece of track in the State.

In our former opinion it was stated that "the custom had grown up in a thickly populated city of comparative size." While it is true that the city of Jackson is a city of considerable size, and in some portions thereof is thickly populated, the accident happened

Digitized by Google

in the southwestern suburbs of the city, where the population is comparatively sparse. A further fact, not stated in our original opinion, is, we think, important. From the point where plaintiff's decedent presumably entered upon the railroad tracks to the point where he met his death he crossed four streets. At each street intersection, the right of way being occupied by two distinct companies, there were two warning signs stationed. Upon the defendant's tracks likewise at each of said crossings there were placed ordinary cattle guards, some made of wood and some of metal. While the record shows that at times, at one or another of these various crossings, the cattle guards were taken up by the defendant company for its own purpose, there is no evidence contained in the record tending to show that on the morning plaintiff's decedent met his death any of the cattle guards were out of place. A further important fact not alluded to was that plaintiff's decedent was killed at a point well within the yard limits of the defendant company at a point where switching operations were of frequent occurrence.

The conclusion in our former opinion rested upon the assumption that the exact question presented was new in this State, and the case was therefore determined under the principle enunciated in volume 8, § 1725, White's Supplement to Thompson on Negligence. No discussion of the Michigan cases bearing upon the question is contained in the opinion. It being asserted by counsel for appellee that by our former opinion several earlier decisions of the court have been overruled, it is necessary to carefully examine those cases. I am of the opinion that the exact question presented is not new in this State.

In *Sturgis* v. *Railway Co.*, 72 Mich. 619 (40 N. W. 914), the plaintiff was injured while walking along defendant's track near its station on her way to the main

Digitized by Google

street of the village of Durand, instead of going through the station to her point of destination by a slightly longer route. She alleged in her declaration that a custom had grown up, which had been in force seven years, to permit, allow, and compel the passengers to walk over the aforesaid course and ground to reach the highway in the village of Durand. This court, speaking through CAMPBELL, J., said:

"The only ground urged for plaintiff was that the railroad track was very generally used as a shorter cut from the village to the depot than was furnished by the regular road. So far as defendant's use of it is concerned, it was not shown to have differed in any way from that generally made of railroad tracks on railroad premises, and no other means of travel on it appeared than would be found on any such track. The company never took measures to light it, or to facilitate ingress and egress. The travel over it was just such as will be found anywhere along such tracks, which cannot be closed more effectually than by a cattle guard. It is impracticable to keep off trespassers from an open track, and all who go upon it do so on their own risk of such dangers as are incident directly to such use."

In the case of *Clark* v. *Railroad Co.*, 113 Mich. 24 (71 N. W. 327, 67 Am. St. Rep. 442), plaintiff was injured while crossing the unfenced station grounds of the defendant. The court there said:

"It is apparent that persons living upon that street west of Main street find the distance to the business portion of the town shorter by going in a direct line across the tracks than by taking the highway running northeast to Main street, and then south; and, the station grounds being unfenced, people are in the habit of walking upon and across them at will. There is no evidence indicating an invitation or license unless it be found in the fact that the defendant has taken no steps to prevent it. * * * Counsel for the plaintiff make the claim that the common practice of crossing the unfenced grounds of the defendant at this

Digitized by Google

point for over 20 years had established a public easement, but they cite no authority which sustains the contention. In our opinion the evidence does not create a suspicion of the existence of an easement. There is nothing that indicates a license even, unless it is to be inferred from the fact that the defendant did not care to contest the right of every person whose convenience might lead him to cross the premises. Technically, such people were trespassers; but it is not to the discredit of the defendant that it did not resort to violence or litigation to stop a practice that did it no harm. Whether these persons were trespassers or naked and gratuitous licensees (which last we do not mean to intimate) is unimportant. In neither case had they the right to expect the defendant to forego a reasonable use of its land, in which respect it stood on the same plane as a private person" (citing *O'Neil* v. *Railway Co.*, 101 Mich. 437 [59 N. W. 836]).

In the recent case of *Winnie* v. *Railway Co.*, 160 Mich. 334 (125 N. W. 351), plaintiff, an employee of defendant, was injured while crossing the tracks of defendant in its yards at a point where the railroad company maintained signs notifying the public that there was no thoroughfare, that trespassers are not allowed, and that the place was dangerous. Speaking through Justice MONTGOMERY, we there said:

"Notwithstanding this, people had, as the evidence showed, quite generally been passing over the tracks of the defendant from Treat street to Michigan street, but whether at the precise point at which plaintiff received the injury there was some doubt. But it would appear that tracks had been worn by people passing over these tracks frequently. * * *

"The case was submitted to the jury upon the two last named propositions; the circuit judge instructing the jury, in effect, that if the public had traveled over these tracks to such an extent that the defendant company knew or ought to have known of the custom, and had not stopped it, and had been accustomed to use lights and give warnings, the failure to use the lights and give the warning on this occasion would be a

Digitized by Google

breach of duty to the plaintiff, and he would be entitled to recover. * * *

"We think the case should not have been submitted to the jury upon the first question. It is difficult to conceive what more this company could have done to give warning to the general public that this was a place of danger. The evidence tended to show that a fence had been maintained which had been torn down from time to time. The yard was very plainly devoted to railroad tracks, in which cars and engines were frequently moving back and forth and were themselves a warning of danger, and, with the notices posted as they were, the public who saw fit to pass over these tracks did so with full knowledge of the danger. Except by stationing men at the highway along the track, it is impossible to conceive how the company could have more effectively warned the public that this territory was not a thoroughfare" (citing *Perego* v. *Railway Co.*, 158 Mich. 225 [122 N. W. 535]).

The general doctrine affecting the duty of railway companies to trespassers is set out in section 1705 of White's Supplement to volume 8 of Thompson on Negligence, as follows:

"Railway Company Under no Obligation to Provide in Advance Against the Possibility of Injury to Trespassers.—Except at public crossings and a few other places, the right of way of a railroad company is its exclusive property and it owes a trespasser no greater duty than any other owner of property would owe a trespasser under the same circumstances. The railroad company is not required to anticipate the presence of a trespasser on its track or property, and this rule applies to children as well as to grown persons. The railroad company owes no higher duty to a trespasser than not to wantonly or wilfully injure him. It is only required to exercise ordinary care after discovering his peril not to injure him. The railroad company owes no duty to such persons to employ competent operatives, nor to keep its tracks safe for pedestrians by the use of only sound ties. It is under no obligation to stop its trains at railroad junctions merely for the benefit of trespassers."

Digitized by Google

Following section 1705, and up to section 1725, the author discusses the question at large, citing authorities from nearly every jurisdiction in the United States. Section 1725, the one quoted in our former opinion, and upon which our decision was predicated, is supported by decisions from several of the Western and Southern States, but finds no support in the decisions of this court.

Assuming, for the purposes of this case, that the whistle was not blown and the bell was not rung, plaintiff's decedent is not within the class for whose benefit the statutory signals are required. In the case of *Lepard* v. *Railroad Co.*, 166 Mich. 373 (130 N. W. 668, 40 L. R. A. [N. S.] 1105), the authorities are carefully collected and commented upon by Mr. Justice STONE. He concludes his opinion with the following statement:

"The whole history of the legislation upon this subject shows that it has been for the benefit of the traveler upon the highway who is about to cross, is crossing, or has crossed the highway, and probably might be invoked by a passenger who was injured by reason of a collision caused through the neglect to give the signals required."

Further, assuming that the engine was being operated without lights, we find ourselves confronted with the decision of *Winnie* v. *Railway Co., supra*, where the court charged that, if the defendant had been accustomed to use lights and give warning, the failure to use the lights and give the warning would be a breach of duty to the plaintiff, which would entitle him to recover. We there said:

"The case should not have been submitted to the jury upon [this] question."

The facts under which the injury occurred in the *Winnie Case* were, in my opinion, much more favorable to plaintiff's recovery than are those in the case

Digitized by Google

at bar. The only point more favorable to plaintiff in this case than in that is that in the case at bar there is no evidence that warning signs were posted from point to point at the street crossings ordering the public to keep off. This fact, however, cannot be considered of controlling significance, for, after all, the only purpose of the warning sign is to give notice to the trespasser of the peril he exposes himself to in his unlawful use of the railway tracks. If he receives that notice through other instrumentalities, he is as adequately warned as if he stopped and read a sign advising him of his danger. This court has frequently held that the existence of the railway tracks themselves must be regarded by one entering upon them as notice that he is going into a place of danger. But in the case at bar, in addition to the fact that plaintiff's decedent must have known he was traversing a right of way occupied by two parallel tracks within the switching grounds of the defendant company, the cattle guards which he could only cross in the half light of the early morning with more or less difficulty must have served as a further warning. The right of way of the defendant at the point where the injury occurred was fully fenced and protected by the statutory warning signs at the various crossings traversed by plaintiff's decedent before his injury. Even in some jurisdictions where trespassers are permitted to recover while traversing a railroad right of way longitudinally, such recovery is forbidden when the trespasser, or licensee, is injured within the yard limits. The reason for the rule is well stated in the case of *Waldrep* v. *Railroad & Banking Co.*, 7 Ga. App. 342 (66 S. E. 1030), where the court said:

"The inference that the railroad company has impliedly invited, or at least has impliedly licensed, the public to pass along or cross its tracks, which may exist as to other portions of its right of way, and

Digitized by Google

which at most is an exception by which a trespasser is raised to a licensee, cannot be raised as to switchyards, because such an inference is so inconsistent with the continuous use of its tracks for switching purposes as not to admit of the presumption that there is an invitation or permission granted by the railroad to the public. * * * The supreme court and this court have both recognized that the peculiar use to which that portion of a railroad company's tracks included in its switchyard is subjected is fatal to the creation of any inference which admits of joint occupancy at any time by any member of the public" (citing *Grady* v. *Railroad & Banking Co.*, 112 Ga. 668 [37 S. E. 861]).

While the evidence in the case at bar clearly shows that the track upon which plaintiff's decedent met his death was used from time to time by trespassers and that such use was known to the inferior employees of the defendant, the use thereof fell far short of that made to appear in the *Winnie Case*, and our former opinion cannot stand unless that case is squarely overruled. I am of opinion that our orginal determination of the case at bar, under our own authorities, was wrong. The question of gross or discovered negligence is not involved.

The report of the Interstate Commerce Commission shows that for the year ending June 30, 1914, 5,471 men, women, and children lost their lives in the United States while trespassing upon railroad tracks and cars, and that in the same period 6,354 other men, women, and children were injured in the same manner. The custom of our citizens to use the private rights of way of steam railroads as footpaths is extremely common. Railroad companies are practically helpless so far as preventing such use is concerned. The inferior employees of every railroad know of such use, and if the duty to maintain a lookout, and operate trains with reasonable care, having reference to the safety

Digitized by Google

of trespassers, is imposed upon the railroads by reason of such knowledge, their efficiency as public agencies will be seriously impaired.

The judgment is affirmed.

STONE, C. J., and KUHN, OSTRANDER, BIRD, MOORE, STEERE, and PERSON, JJ., concurred.

LAGDEN *v.* CONCORDIA MUTUAL FIRE INSURANCE CO. OF BAY, SAGINAW & ARENAC COUNTIES.

1. INSURANCE — MUTUAL BENEFIT POLICY — FIRE INSURANCE — BREACH.

   Act No. 128, Pub. Acts 1911, limiting the effect of the breach of any condition in a fire insurance policy to instances where the insurer has suffered prejudice from the breach or where the loss took place because thereof, protected plaintiff, who procured additional insurance in violation of the stipulations of his mutual fire policy and he was entitled to recover the loss sustained in the destruction of his farm buildings, although the by-laws of the insurer provided that a member should forfeit his policy if he procured additional insurance in another company, without defendant's written consent.

2. SAME—STATUTES—FORFEITURE.

   The contention of the defense that, the fire occurring while the violation was in effect, barred plaintiff's recovery, was not sufficient, it appearing from the title of the statute that the purpose was to prevent the forfeiture of policies unless the violation of some condition actually prejudiced the insurer.

3. SAME—EVIDENCE—BURDEN OF PROOF.

   Under the statute the burden was on the insurer to show that it had suffered prejudice therefrom.

Digitized by Google

4. SAME—APPEAL AND ERROR.

Held, on rehearing, that defendant could not avail itself of the point, not made in its briefs or on the former argument, that the statute as amended did not affect a policy in force at the time it was enacted.

STONE, OSTRANDER, and STEERE, JJ., dissenting.

Error to Bay; Collins, J. Submitted April 22, 1914. (Docket No. 107.) Decided September 28, 1915. Reargued June 6, 1916. Former judgment reaffirmed July 21, 1916.

Assumpsit by Harry T. Lagden against the Concordia Mutual Fire Insurance Company of Bay, Saginaw & Arenac Counties, on a certificate of fire insurance. Judgment for defendant. Plaintiff brings error. Reversed.

G. C. Leibrand, for appellant.

Curtis E. Pierce, for appellee.

BIRD, J. The defendant is a farmers' mutual fire insurance company, incorporated under the laws of this State. In February, 1908, the defendant issued to plaintiff a fire policy, insuring him in the sum of $1,400, against loss to his farm buildings and personal property. On the 23d day of November, 1911, plaintiff took out another policy for the sum of $1,665 in the Patrons' Mutual Fire Insurance Company, covering the same property and more. On January 21, 1912, fire destroyed the dwelling, together with its contents. The day following that of the fire, plaintiff notified John Myers, the defendant's secretary, of the loss, and Myers advised him that he would visit the scene of the fire the next day. Myers did not come, but in his stead Mr. Feinhaur, one of the directors, came. While there, plaintiff informed him of the other policy in the Patrons' Company. Mr. Feinhaur instructed the plain-

Digitized by Google

tiff to make out a list of the property destroyed and present it at the next meeting of the board of directors, informing him that he would be notified of the date of the next meeting by the secretary of the company. On February 12th the secretary notified plaintiff of the meeting of the board on the 19th, and requested him to meet with them at that time. On that date plaintiff appeared before the board with his proofs of loss. While there he was informed by the president of the company that the company refused to pay the loss, because of his failure to give notice of the additional insurance. The provisions of the charter and by-laws upon which such refusal were based follow:

Section 6 of the by-laws provides:

"Any member insuring the same property with another company, after receiving a policy in this company, without first obtaining the written consent of this company, forfeits his insurance in this company."

Section 21 of the charter provides:

"If any person, having property insured in this company, shall procure the same to be insured in any other company, it shall be his duty to at once give notice of such other insurance to the secretary; and the president and secretary may, in their discretion, cancel his policy, and, in case he shall fail to give such notice, his policy shall be void from the date of such other insurance, and this company shall not be liable for any loss occurring after that date."

Section 7 of the charter provides:

"Any member who shall neglect or refuse to comply with the by-laws, or with this charter, shall not be entitled to receive payment for any loss, unless it shall be satisfactorily ascertained that the loss was not caused by such neglect or refusal."

The defendant's prorating clause reads:

"In case of loss, if there be other insurance upon the property, the insured shall not be entitled to demand or recover on his policy any greater amount or

Digitized by Google

proportion of the loss or damage sustained to the property insured than the amount insured in this company shall bear to the whole amount of insurance on said property."

The Patrons' Company had a similar clause. Its prorated share of the loss was $501.99, and was paid by that company.

At the close of the testimony, both parties requested a directed verdict. The trial court declined them, and submitted to the jury the question whether the defendant had waived the forfeiture.

Plaintiff's motion for a directed verdict was based upon Act No. 128, Pub. Acts 1911, which follows:

"No policy of fire insurance shall hereafter be declared void by the insurer for the breach of any condition of the policy if the insurer has not been injured by such breach, or where a loss has not occurred during such breach *and* by reason of such breach of condition."

Plaintiff contends that this provision of the statute is applicable, and inasmuch as it did not appear that the defendant was injured by the violation claimed, the court should have directed a verdict as requested. Defendant's position is that the provision does not apply, because it was shown that the fire occurred *during* the breach of a condition of the policy.

The act was originally passed by the legislature at its session of 1897. The legislature at its session of 1911 amended it, by striking out the word *"or"* and inserting in its stead the word *"and,"* which appears in the foregoing in italics. As the act was originally passed, it was many times before this court for construction, and it was uniformly held, in substance, that if there were an existing breach of condition of the policy when the fire occurred, the act would not be available to the insured, even though the fire did not occur by reason of such breach. *Boyer* v. *Insurance*

Digitized by Google

Co., 124 Mich. 455 (83 N. W. 124, 83 Am. St. Rep. 338); *Shelden* v. *Insurance Co.*, 124 Mich. 303 (82 N. W. 1068); *McGannon* v. *Insurance Co.*, 127 Mich. 636 (87 N. W. 61, 54 L. R. A. 739, 89 Am. St. Rep. 501); *A. M. Todd Co.* v. *Insurance Co.*, 137 Mich. 188 (100 N. W. 442); *King* v. *Insurance Co.*, 140 Mich. 258 (103 N. W. 616, 6 Am. & Eng. Ann. Cas. 87). See, also, *Benham* v. *Insurance Co.*, 165 Mich. 406 (131 N. W. 87, Am. & Eng. Ann. Cas. 1912C, 983; *Macatawa Transportation Co.* v. *Insurance Co.*, 179 Mich. 443 (146 N. W. 396).

Obviously for the purpose of avoiding this construction, and making the act effective to do what its title indicates it was originally intended it should do, the legislature made this change. We are now asked by defendant to give the act the same construction that was given to it before the amendment was made. To do this we must say that the act means the same now as before the amendment was made, and that the legislature did an idle thing, and had no purpose in view in making the amendment. The title to the act reads:

"An act to prevent the forfeiture of fire insurance policies by the violation of any condition of the policy when such violation has been without prejudice to the insurer." Act No. 167, Pub. Acts 1897.

A mere glance at this title is convincing that the evident purpose of the legislature was to prevent forfeitures of fire insurance policies for violation of conditions which did not cause the fire. This evident purpose was thwarted by the construction which this court felt obliged to give to the wording of the act. To obviate this construction the amendment was presumably made. The act as amended makes it clear:

(*a*) That no forfeiture is to take effect if the insurer has not been injured by a breach of condition.

(*b*) That no forfeiture is to take effect if the fire was not caused by a breach of condition, even though the breach was existing at the time of the fire.

Digitized by Google

Our conclusion is that the plaintiff was right in his contention as to the application of the statute.

2. The further argument is made that, even if this is the proper construction, the court was right in refusing to direct a verdict because the burden of showing that defendant was not injured by reason of the violation rested upon the plaintiff; the proofs being silent upon the question as to whether the violation was in any wise responsible for the loss. It would seem to have been the intention of the legislature, in passing this law, to prohibit defenses based upon such violations, unless there was some connection shown between such violations and the loss. The plaintiff, by introducing the policy and showing his loss, makes a *prima facie* case, which entitles him to recover in the absence of proof of a breach of the contract. The burden is then upon the defendant to show that the policy has been avoided by a breach of its conditions. In order to make that defense effective, it is necessary to further show some connection between the loss and the breach of the condition, and this burden would seem to properly rest upon the defendant. By this provision the legislature has prescribed the conditions under which such a defense can be made, and it has in effect read this provision into each condition of the policy. Therefore the burden of showing that the facts are such as make the condition, as amended by the act, an effective defense, lies with the defendant. The request should have been granted. In view of these conclusions, we think plaintiff's motion should have been granted.

The judgment of the trial court will be reversed, and a new trial ordered.

BROOKE, C. J., and KUHN and MOORE, JJ., concurred with BIRD, J.

The late Justice MCALVAY took no part in this decision.

Digitized by Google

OSTRANDER, J. (*dissenting*). The written application of the plaintiff contained the following:

"And I hereby, for myself, my heirs, executors, and administrators, agree to abide by the charter and by all existing by-laws, and also by all amendments and additional by-laws of the said company. * * * Refusal or neglect on my part to comply with the charter and by-laws of said company, and this agreement, shall render the policy void."

When this is read with section 21 of the by-laws, set out in the opinion of Mr. Justice BIRD, it is made plain that, in so far as the parties could, by agreement, provide for avoidance of the policy in suit, they have done so. There is something here more than a mere condition imposed by the insurer. There is a promissory warranty of the insured, which he has admittedly breached. The act of 1911, pleaded by plaintiff in avoidance of the forfeiture of the policy, which by the terms of the agreement became void when the additional insurance was procured, does not relieve from breach of a warranty. *Benham* v. *Insurance Co.*, 165 Mich. 406 (131 N. W. 87, Am. & Eng. Ann. Cas. 1912C, 983); *Shelden* v. *Insurance Co.*, 124 Mich. 303, 311 (82 N. W. 1068); *McGannon* v. *Insurance Co.*, 127 Mich. 636 (87 N. W. 61, 54 L. R. A. 739, 89 Am. St. Rep. 501).

There is another sufficient reason for the conclusion that the statute invoked will not relieve the plaintiff. Treating the provision in question as a condition merely, it is one of several found in all policies of fire insurance in this State, which, when the policy is issued—the contract made—and thereafter, relate to the very subject of the insurance, relate to the property in risk, its status, and the interest of the insured therein. For example, there are those relating to the title to the property insured, and whether it is incumbered or free from incumbrance. If the construction and ap-

Digitized by Google

plication of the statute which are made by Justice BIRD are sound, then what will prevent A. from procuring insurance upon the property of B., and, if it burns, recovering upon the policy? Or, if real estate insured is incumbered for more than its value, what is to prevent the owner recovering upon a policy, despite his representations that the property was free from incumbrance, and his agreement that, if it was not, the policy should be therefore void, if the insurer cannot show that the fact of the incumbrance was, in fact, the occasion of the loss?

There is another class of conditions found in insurance policies generally, and in our own standard policy, which affect only particular hazards to which insured property may or may not be liable. That a house shall not be vacant for a considerable period of time, that gasoline or other inflammable or explosive substances shall not be kept upon the premises, are common conditions, and failure to observe them may be the occasion of a loss. Breaches of such conditions may be occasional, and not mischievous. It is only while they continue that they affect the risk. In the days when policies of insurance were prepared by the insurer—were substantially unilateral with respect to terms and conditions—and were therefore construed most strongly against the insurer, it was uniformly considered, in fact and in law, that representations of the insured as to the title to the property, the incumbrances thereon, the insurance carried, and the provisions for a continuance of the risk assumed in the first instance by the insurer, without substantial change, were vital. The courts have always recognized the moral hazard in fire insurance. Quoting from Ostrander on Fire Insurance, Mr. Justice MOORE, in *Excelsior Foundry Co.* v. *Assurance Co.*, 135 Mich. 467, 474 (98 N. W. 9, 3 Am. & Eng. Ann. Cas. 707), said:

"The character of the hazard being established to

Digitized by Google

the satisfaction of the insurer, its next concern is that no material change shall take place without its consent; and this, too, is provided for by the terms of the policy. The insurer cannot watch its many ventures. They are often remote and widely scattered, and besides, too, the greatest dangers that menace property are those that are frequently hidden from public scrutiny. The only practicable plan, therefore, of preserving the status of the risk, is to make the validity of the policy depend upon the insurer being informed of any material changes made, and its consent obtained."

It cannot be presumed that a breach of a condition which increases the moral hazard does the insurer no injury. Quite the contrary. Courts have uniformly avoided the policy upon breach of such conditions, upon the ground that an essential and material change of the contract was thus effected and the insurer prejudiced. In the case at bar the plaintiff placed upon his property an estimated cash value of $750, and the defendant insured it for $500. In applying to the Patrons' Insurance Company for further insurance, he placed on the property a value of $700. That company issued a policy for $465. The total insurance was therefore $965 upon property valued by plaintiff at $700. Both companies, to his knowledge, insured on the basis of two-thirds actual value.

The statute invoked by plaintiff may be construed, and I think should be construed, as applying only to that class of conditions which relate, usually, to casual risks, and as not applying to those which relate to matters which are of the very essence of the contract —those which must always be considered as controlling in accepting and in continuing the risk. So construed, it may be sensibly read and applied along with the statute which prescribes a standard form of policy, in which breaches of various conditions do, in terms and at once, make the policy void.

Digitized by Google

The question whether the defendant waived the breach of condition complained about was submitted to the jury. I am of opinion that it was properly a question of fact, and, while the charge of the court is criticised, do not find error in the instructions. Two letters were offered in evidence by plaintiff, and were excluded. They were written by the secretary of defendant, and of them it is said they tend to support, to corroborate, the testimony of plaintiff and his wife. In my opinion, they have no such tendency. They were not addressed to or received by plaintiff, and do not affect the question whether plaintiff was induced, by a promise or by conduct, to assume or believe that the defendant waived or would waive its rights under the policy.

Counsel have not made the point that the statute relied upon by plaintiff became effective in 1911, while the policy in suit was issued in 1908, and therefore is not affected by it. Counsel for plaintiff does rely, however, upon a provision of the charter of defendant which reads as follows:

"Any member who shall neglect or refuse to comply with the by-laws or with this charter, shall not be entitled to receive payment for any loss, unless it shall be satisfactorily ascertained that the loss was not caused by such neglect or refusal."

His contention is answered by saying that this provision may be given force and may have application, but not in cases where by the express terms of the charter and the policy the policy is void.

For the reasons stated, I disagree with the conclusion of my Brother BIRD, and think the judgment should be affirmed.

STONE and STEERE, JJ., concurred with OSTRANDER, J.

Digitized by Google

ON REHEARING.

BIRD, J. This case has been reheard. The argument, which was directed to the question whether Act No. 128, Pub. Acts 1911, was applicable to the facts involved in this case, has failed to convince us that our opinion heretofore filed should be disturbed.

Another and a new question was also argued, namely, that the provisions of this act were not applicable, because the contract of insurance was executed prior to the passage of the act. This presents an interesting question, but the practice forbids our consideration of it, because it was neither raised nor argued on the original hearing of the case in this court. *Nissly* v. *Railway Co.*, 168 Mich. 676 (131 N. W. 145, 135 N. W. 268, Am. & Eng. Ann. Cas. 1913C, 719). The only reference made to this defense was in the dissenting opinion, and the writer thereof refused to consider the point, because not raised by defendant.

The judgment of the trial court will be reversed, and a new trial ordered, with costs to the plaintiff.

KUHN, MOORE, STEERE, BROOKE, and PERSON, JJ., concurred with BIRD, J.

OSTRANDER, J. We adhere to the views expressed in the former opinion.

STONE, C. J., concurred with OSTRANDER, J.

Digitized by Google

STEARNS SALT & LUMBER CO. *v.* DENNIS LUMBER CO.

1. SALES—WARRANTY—IMPLIED WARRANTY—ACCEPTANCE.
   In an executory contract for the sale of personal property, the implied warranty of quality or fitness does not survive acceptance of the goods, and it is the duty of the purchaser to inspect and reject, or pay the contract price.

2. SAME—SEVERABLE CONTRACT—ACCEPTANCE OF PART.
   In an action for the balance due on two cars of lumber, which plaintiff sold to defendant without an express warranty, where the defendant acted promptly in inspecting the lumber and tendered payment for the part accepted, and notified plaintiff that the rest was rejected, the court was not in error in instructing the jury that the contract was severable and defendant had the right to accept such as conformed to the warranty and reject the rest. STONE, OSTRANDER, and STEERE, JJ., dissenting.

Error to Kent; Perkins, J. Submitted April 15, 1915. (Docket No. 113.) Decided September 28, 1915. Rehearing denied September 27, 1916.

Assumpsit by the Stearns Salt & Lumber Company against the Dennis Lumber Company, a corporation, in justice's court, for goods sold and delivered. From a judgment for defendant plaintiff appealed to the circuit court. Judgment for defendant on directed verdict. Plaintiff brings error. Affirmed.

Hatch, McAllister & Raymond, for appellant.

Travis, Merrick & Warner, for appellee.

KUHN, J. On December 29, 1911, the defendant company placed an order with the plaintiff company by telephone for two car loads of a certain grade of

Digitized by Google

lumber, and followed this by letter confirming the same, which read as follows:

"DENNIS LUMBER COMPANY.
"GRAND RAPIDS, MICH., 12-29-11.

"Stearns Salt & Lumber Company,
"Ludington, Mich.

"*Gentlemen:*

"Confirming conversation over the phone the other evening with Mr. Holland, at which time he booked our order for the two more cars of 4 in. No. 4 pine crating strips D2S to ¾ in., to be same quality as the last shipped us, we wish to inquire as to how soon you will be able to make shipment of these two cars.

"Awaiting your reply, we are,
"Yours very truly,
"DENNIS LUMBER COMPANY."

To this communication the plaintiff company replied under date of December 30, 1911, advising that the lumber would be shipped at once.

On January 6, 1912, the plaintiff mailed to the defendant an invoice of the first car of lumber shipped, and on January 11, 1912, sent an invoice of the second car load shipped. The first car of lumber was placed for unloading February 19, 1912, and was unloaded on the following day. The other car was placed for unloading on February 21, 1912, and the unloading of that car was completed within two days, on February 23d. On the next day, February 24, 1912, defendant notified plaintiff of the rejection of part of the lumber received, by the following communication:

"DENNIS LUMBER COMPANY.
"GRAND RAPIDS, MICH., Feb. 24, 1912.

"Stearns Salt & Lumber Co.,
"Ludington, Michigan.

"*Gentlemen:*

"We herewith hand you report on the two cars of pine crating as follows:

B. & M. 61015--27,106 ft. of good
1,479 ft. of worthless culls

Digitized by Google

28,585 ft. total which shows
—a shortage of 32 ft.
O. C. L. 9114___25,540 ft. of good
2,395 ft. of worthless culls

27,935 ft. total.

"The writer has looked these culls over very carefully, and there is no doubt but that our customer has been more than fair in what he has taken. However, if you wish, we will have Mr. Tillitson go over the culls, or if your Mr. Holland can spare the time to go with us to look them over the next time he is down here, it will save any unnecessary expense in the matter.

"We are certainly surprised that any inspector could or would attempt to ship any such strips for No. 4, as they are so poor and rotten that they will hardly hold together and are absolutely of no value whatever.

"We herewith enclose statement and our check to balance account for these two cars.

"Yours very truly,
"DENNIS LUMBER COMPANY."

The plaintiff company immediately replied that it would not consent to any loss on the car, and must have settlement in full. Further correspondence was had between the parties, and finally suit was brought to recover the sum of $50.75, the claimed balance due on the two cars in question, the value of the lumber rejected. Suit was started in justice's court, which resulted in a judgment in favor of the defendant, and on appeal taken to the circuit court the trial judge directed a verdict of no cause of action.

It is contended here that the circuit judge erred in holding and instructing the jury that the contract in question was severable, and that the defendant had a right to reject part of the lumber in question and accept the remainder. It is the contention of the plaintiff that the defendant had purchased these two cars of lumber, of one quality and grade, and as soon as

Digitized by Google

the cars arrived the defendant had a reasonable time in which to inspect the same and ascertain if they complied with the requirements of the contract as to quality and grade, and after such examination defendant was obliged to either accept or reject all of the lumber; and if he accepted a part of the lumber, and then used the same, he was obliged to pay the contract price of all of the lumber. Reliance is placed upon the cases of *Sisson Lumber, etc., Co.* v. *Haak,* 139 Mich. 383 (102 N. W. 946), and *Columbus & Hocking Coal, etc., Co.* v. *See,* 169 Mich. 661 (135 N. W. 920).

It is true that it is the rule of law in this State that in an executory contract for the sale of personal property, where there is an implied warranty, the warranty does not survive the acceptance of the goods, and it becomes the duty of the purchaser to make an inspection and reject or pay the contract price, which proposition of law is fully sustained by the two Michigan cases above cited. But the question here is rather whether or not the contract in question is a severable one, and whether or not the defendant could, after inspection, in view of the rule of law here established, reject that part of the lumber which did not meet the specifications. The question of the right of the consignee to reject a portion of the shipment which is below grade or worthless, while accepting the greater part of the shipment, is not involved in the decision of the *Sisson Lumber Co. Case, supra,* and likewise in the *Columbus & Hocking Coal, etc., Co. Case, supra,* the entire cargo was of an inferior quality, and the consignee accepted the shipment of coal and attempted to make a settlement upon a reduced price because of the alleged inferior quality of the coal. No Michigan case has been called to our attention, nor have we been able to find such a case, in which the precise question here involved was under consideration.

In the case of *McFadden* v. *Wetherbee & Co.,* 63

Digitized by Google

Mich. 390 (29 N. W. 881), in which there was under consideration a contract for the delivery to a vendee of pine blocks of a specified quality, and the vendee had failed to reject the blocks at the time of delivery, although advised that they were defective, and paid for the same, this court said:

"The defendant had the right, at the time of the delivery, to reject any and all blocks not coming up to the standard of the contract; but, if it paid for them at that time, or afterwards, without rejecting any, although complaint was made of their being defective, the defendant nevertheless lost thereby the right in this suit to plead a breach of the contract as far as the blocks so paid for were concerned; nor would it authorize the rejection and nonacceptance of blocks thereafter to be delivered under the contract, without a showing that the blocks so offered to be delivered were also defective. No such showing was made."

So in the instant case, if the defendant had taken into possession the rejected lumber and assumed to dispose of it at a less price, as was done in the *Columbus & Hocking Coal, etc., Co. Case, supra,* there could be no question that under the law in this State the damages thus sustained could not have been recouped in an action to recover for the rejected lumber. But here the defendant moved promptly by notifying the plaintiff the very next day after the inspection of the rejection of the lumber in question.

In a similar case in Maryland, *Canton Lumber Co.* v. *Liller,* 107 Md. 146 (68 Atl. 500), the court held that the plaintiff had a right to accept lumber which was up to the grade contracted for, and that by so doing it did not accept the part which was below grade. In its opinion the court said:

"Unless it measured up to the specifications, it was of no practical value to the plaintiff for the only purpose for which it was ordered, and, not being a dealer equipped for resale, it was of little value to him for any purpose. He was compelled, in order to perform

Digitized by Google

his contract with the railroad company, to purchase without delay other lumber to replace such as should be rejected under proper inspection. Can it be supposed then that it was the intention of either of the parties that if one-half or one-quarter of the lumber passed the inspection, and the remainder was rejected, that the plaintiff could not use the former for the specific purpose for which it was bought, without being required to take also the rejected portion which he could not use? Such a conclusion is as irrational when attributed to the defendant as when attributed to the plaintiff, under all the circumstances of this case. And this construction is supported by the subsequent dealing of the parties with respect to the rejected lumber, which was accepted and removed from Keyser by the defendant. It is true that this alone would not be conclusive, and it would have comparatively little significance if accompanied by a declaration that the acceptance of the rejected lumber was only for the purpose of reducing thereby the damage sustained, but when unexplained, as in this case, the conduct is most significant of the intention of the parties. As illustrative of this view, it was said in *Richards* v. *Shaw*, 67 Ill. 222, that the modern rule is that the entirety of a contract of sale is severed by the buyer's receiving and retaining a part after the seller has refused or failed to deliver the residue of the specific quantity of goods bargained for.

"The case of *Holmes* v. *Gregg*, 66 N. H. 621 [28 Atl. 17], relied on by the plaintiff, is directly in point, and meets with our full concurrence. That was a sale of lumber shipped on cars in five lots, three of which were accepted and used by the defendants, and the others, not conforming to the order in quality, were rejected and piled in their yard, where they remained, subject to the plaintiff's order. The defendants seasonably informed the plaintiffs of their action, and tendered the price of the accepted lumber, and the court said: 'Without an express stipulation that the contract was or was not entire, the parties might have understood that it was severable in such a sense that the defendants could accept the lumber that conformed to the contract and reject the rest.'"

Digitized by Google

We are of the opinion that the trial court was correct in holding that the contract was a severable one, and no error was committed in so charging the jury.

In his reasons for directing a verdict the court also stated that thus severing the contract was in accordance with a custom universal among lumber dealers, and it is contended that this was error because, it is claimed, the testimony in this respect falls far short of establishing such a universal custom as to warrant this conclusion on the part of the court. Being of the opinion that the court arrived at a proper conclusion with respect to the other question, and properly directed a verdict for that reason, it is unnecessary for us to determine whether under the facts in this case the testimony was sufficient to justify a conclusion that a universal custom had been established.

The judgment is affirmed.

BROOKE, C. J., and BIRD and MOORE, JJ., concurred with KUHN, J.

OSTRANDER, J. (*dissenting*). The first letter which appears in the record in respect to the matter in controversy was written by the defendant to the plaintiff December 29, 1911, which recites that it confirms a conversation over the phone between plaintiff's representative and defendant's representative, "at which time he booked our order for the two more cars of 4 in. No. 4 pine crating strips D2S to ¾ in. to be same quality as the last shipped us," and inquiring when shipment would be made. In answer the plaintiff on December 30th wrote the defendant:

"Your favor of the 29th received, relative to two cars 4 in. pine strips, and we are pleased to advise you we are in position to get these on the way to you at once."

With this letter when a statement on an order blank of the plaintiff, dated December 30, 1911, describing

Digitized by Google

two cars 1x4 pine crating S2S to ¾ in., $13, upon which was printed:

"The above is a copy of your order as we understand it. If incorrect wire us immediately."

The first car was shipped January 6, 1912, on which day the invoice of the car sent to the defendant is dated. The invoice is:

"Pine crating S2S to ¾ 1x4 28617 13.00..... 372.02
Less freight."

The other car was shipped January 11th, the invoice dated that day and sent to defendant, and the invoice describes:

"Pine crating S2S to ¾ 1x4 27933 13.00..... 363.13
Less freight."

These invoices and the cars were received by the defendant, and the cars were placed by them with their customers. They paid $400 on account before the arrival of the cars. Defendant bought the lumber to be sold again. The cars were unloaded by the customers, and defendant wrote plaintiff on February 24th, giving a report of the two cars, showing that out of the first car 1,497 feet and out of the second car 2,395 feet had been rejected as worthless culls. Accompanying this report and statement was defendant's check to balance the account as per the statement. On February 28th, plaintiff wrote the defendant acknowledging receipt of the said statement, saying:

"Now in reply will say that we did not sell you a No. 4 grade. Our order confirming this deal reads 1x4 pine crating, which means No. 4 and 5 mixed. We cannot stand any loss whatever on these two cars and we must have settlement in full."

Further correspondence followed, defendants refused to pay, and this suit was brought to recover the balance of $50.75. The cause came on for trial in the

Digitized by Google

circuit court, on an appeal from justice's court, and among other testimony offered on the part of the defendant in that court was some which the defendant asserts tended to and did prove a custom of the lumber trade permitting the buyer to accept part of a car without accepting all of it. The testimony further tended to prove the facts above stated, but no point appears to be made by counsel upon plaintiff's denial that it did not sell No. 4 grade. In argument the sale is treated as one upon implied warranty. The circuit court directed a verdict for the defendant, saying, among other things:

"I think it satisfactorily appears that the contract in this case was a severable contract, and, further, that according to the custom universal amongst lumber dealers, the conduct of the defendant company was justified, and when an amount was sent to the defendant covering the contract price of the grade of lumber accepted and the check retained by the plaintiff company, that the defendant had done all it was required to do."

The testimony fails to prove a custom known to plaintiff, and has little tendency to prove a custom in Grand Rapids, where the lumber in question was received. What effect the court gave to the fact that plaintiff kept the check sent by defendant with its statement is not apparent. The money was due to it, and, as it contends, was a partial payment only.

That the court was wrong in holding the contract severable is, I think, clear. It was not, in terms, severable. The sale was a sale of a car load, and a car load was tendered in performance. The tender of a few strips or of half a car load would not have answered the seller's promise. The action of the buyer in accepting a few or many strips, or boards, would not sever the contract. Defendant, with no notice to plaintiff, turned the lumber over to a customer before inspection. Submission or a lawsuit were the

Digitized by Google

alternatives presented by the buyer to the seller, as they would be in every similar case.

The Maryland case, cited by my Brother KUHN, was not in its facts like the case at bar. In that case lumber to conform to blue-print and other specifications was agreed to be delivered—409,943 feet in all. To the knowledge of both parties it was to be used in the construction of a certain building, and plaintiff, the buyer, claimed it was subject to the inspection of the agents of the railroad for which the building was to be constructed. Some 56,000 feet were used, and the remainder rejected, and the seller removed the rejected lumber. The buyer purchased the necessary material elsewhere at a higher price and sued for his damages. The court refers approvingly to a New Hampshire case. Examination discovers that it is a case in which five lots of lumber of different dimensions and prices were sold. Three lots were accepted and used, the others, "not conforming to the order in dimensions, quality, quantity, and price, were rejected," of which the sellers were seasonably informed. The Maryland court also refers to a Maryland case where the sale was of three negroes, warranted to be sound, and it was held that the contract was severable. None of the cases is like the one at bar.

Whether a particular contract is entire or separable is a question of intention, which intention is to be determined by the language used by the parties and the subject-matter of the agreement. I quote, as applicable to the case presented upon this record, the language of the supreme court of Iowa in *Pacific Timber Co.* v. *Windmill & Pump Co.*, 135 Iowa, 308, 310 (112 N. W. 771), as follows:

"It is very difficult to lay down a rule which will apply to all cases, and consequently each case must depend very largely upon the terms of the contract involved. In this case we think it almost conclusive

Digitized by Google

that the parties did not intend the contract in question to be separable. It is hardly conceivable that the plaintiff, living more than 2,000 miles away from the defendant's place of business, should contemplate the shipment of a car load of lumber, although consisting of pieces of different dimensions, with the understanding or intention that each piece of timber so shipped should constitute the basis of an independent contract, so that the consignee should be at liberty to reject any part of the lumber so shipped and retain the balance; nor is there anything in the contract itself indicating that the defendant had any thought that it was to receive any other than an entire car."

For the reasons stated, I disagree with the conclusion of my Brother KUHN, and think the judgment should be reversed, and a new trial granted.

STONE and STEERE, JJ., concurred with OSTRANDER, J.

The late Justice MCALVAY took no part in this decision.

Digitized by Google

INDEX.

ABANDONED LANDS—See TAXATION (11, 12).

ABILITY TO PERFORM—See SPECIFIC PERFORMANCE (6).

ABORTION—See CRIMINAL LAW (1); EVIDENCE (16); INSURANCE (3); WITNESSES (3).

ABUSE OF DISCRETION—See WITNESSES (2).

ACCEPTANCE—See COMPROMISE AND SETTLEMENT (3); SALES (5, 6).

ACCOUNTING—See EQUITY (5); TAXATION (6); TRUSTS (7, 11, 12).

ACETYLENE GAS PLANT—See CONTRACTS (1).

ACTION—See ASSIGNMENTS; FRAUD (5); INSURANCE (2); USE AND OCCUPATION (2, 3).

ACTIONS, LIMITATION OF—See LIMITATION OF ACTIONS.

ACTUAL CONSIDERATION—See FRAUDULENT CONVEYANCES (2).

ACTUAL INJURY—See PRINCIPAL AND SURETY (4).

ADEQUATE REMEDY AT LAW—See BOUNDARIES (2); EQUITY 2, 4, 5); SPECIFIC PERFORMANCE (3); TRUSTS (12).

ADJOINING LANDOWNERS—See BOUNDARIES (2).

ADMISSIONS—See EVIDENCE (10, 13); INSURANCE (2); MASTER AND SERVANT (20).

ADOPTION—See PARENT AND CHILD (1, 2).

ADVERTISEMENT—See MORTGAGES (2); TENDER (1).

AGENCY—See PRINCIPAL AND AGENT.

AGENT'S AUTHORITY—See PRINCIPAL AND AGENT (1, 3-6).

Digitized by Google

AGREEMENT BETWEEN HUSBAND AND WIFE—See DIVORCE (1).

AGREEMENT NOT TO RE-ENGAGE IN BUSINESS—See CONTRACTS (2).

ALIMONY—See DIVORCE (1, 3, 5, 7, 11).

ALLEYS—See RAILROADS (2).

AMENDMENTS.

A mistake in the order for appearance of defendant in a divorce proceeding resulting in the order fixing a period for defendant to appear of four months instead of five, as it ought to have required, where complainant's solicitor corrected the error, and caused the order to be correctly published, was open to amendment, and should have been corrected at the hearing by the circuit judge, nobody having suffered any prejudice. 3 Comp. Laws, § 10268 (5 How. Stat. [2d Ed.] § 12969). *Jankovich* v. *Circuit Judge*, 284.

See MUNICIPAL CORPORATIONS (3, 4).

"AMOUNT PAID"—See TAXATION (8).

ANIMALS—See EVIDENCE (7, 8).

ANNUAL REPORTS—See FRAUD (1).

APPEAL AND ERROR.

1. Where plaintiff recovered in the court below, this court, on appeal, is bound to take that view of the evidence most favorable to plaintiff. *Moss* v. *Railway Co.*, 1.

2. In the absence of exceptions to the decision of the court below, this court cannot review the action of the circuit judge in overruling a motion for a new trial on the ground that the verdict is against the great weight of the evidence and grossly excessive. *Dyer* v. *Ice Co.*, 203.

3. The court on appeal will not review contempt proceedings for violation of an injunction of the lower court, upon a record which does not disclose what, if any, adjudication was made. *First State Bank of Decatur* v. *Day*, 229.

4. Any possible prejudice that may have resulted from submitting to a jury the question of undue influence in a will contest, or from admitting evidence upon the subject, was cured by a special finding that decedent was incompetent to execute a valid testamentary disposition of his estate. *In re Thayer's Estate*, 261.

5. Upon an affirmative showing in the record that appellants' attorney did not claim the right to argue the question of damages to the jury, no prejudicial error resulted from the action of the trial court in directing a verdict for plaintiff. *Taylor* v. *Belton*, 302.

Digitized by Google

APPEAL AND ERROR—Continued.

6. Where defendant's counsel failed to invoke action of the court, after excepting to opposing counsel's remark charging him, without warrant, with pettifogging, he is without remedy, on appeal. *Mortensen* v. *Bradshaw*, 436.

7. Defendant appealed from the decree of the circuit court in chancery entered after the cause had been remanded for modification of the decree settling the affairs of an estate following an appeal to the Supreme Court. He claimed that he was charged with $377.74 for the benefit of complainant that was no proper obligation of and in no way related to the affairs of the estate; that the money was an advance by complainant for his personal benefit, in the adjustment of a private timber purchase and other similar deals. The decree entered on the first appeal contained the provision that complainant and appellant were entitled to liens on the property in question to the amounts of their respective contributions and that the parties should be entitled to be subrogated to the rights of creditors of the estate having liens upon the real property in question. And the final order provided that if it should appear that any part of the contributions of either party was not contributed for the benefit of the estate the court might make deductions and compute the proportions accordingly. The final decree was entered in the circuit court without making deductions and computing proportions, as ordered by the appellate court, and it is *held* that the decree should be modified to conform to the former holding of this court, and a deduction be made under the unconflicting testimony from the amount to be credited to complainant. *Stroh* v. *Bauman*, 579.

See AUTOMOBILES (3); CARRIERS (8); EVIDENCE (3, 5, 9); INSURANCE (7); JUSTICES OF THE PEACE; MASTER AND SERVANT (20); NEW TRIAL (1); PHYSICIANS AND SURGEONS (2); TRIAL (1, 6, 13, 14, 18).

APPROVAL OF LIQUOR BOND—See INTOXICATING LIQUORS (2, 3).

ARGUMENT OF COUNSEL—See APPEAL AND ERROR (5, 6); TRIAL (3, 9, 10, 18).

ARREST—See CRIMINAL LAW (2).

ASSAULT WITH INTENT TO RAPE—See TRIAL (9-11).

ASSIGNMENTS.

The assignee of a vendee's interest in a land contract, which contained no restrictions against selling and assigning his rights thereunder, succeeded to all his rights and could sue in her own name for specific performance, or, if performance was impossible, for damages. *Brin* v. *Michalski*, 400.

See CONTRACTS (5).

Digitized by Google

ASSUMPSIT, ACTION OF.

1. Upon a declaration in justice's court containing the common counts in assumpsit, the purchaser of a team of horses was entitled to recover the value of a horse which died; one having proved unsatisfactory and being returned to the seller, plaintiff receiving for it another that subsequently fell ill, and upon his returning it to the vendor, died while in the possession of the latter; plaintiff was entitled to treat the refusal to replace the horse or return the price as a partial failure of consideration, and no special count was required. *Taylor* v. *Belton*, 302.

2. Nor was it sufficient, to defeat plaintiff's right of recovery, that he exchanged his team as a part of the consideration for the horses, receiving $200 credit for them in the trade, the testimony also showing that the defendant was allowed $150 for each horse. *Id.*

See USE AND OCCUPATION (3).

ATTORNEY AND CLIENT—See MASTER AND SERVANT (20).

AUDITOR GENERAL—See TAXATION (11, 12, 14).

AUTOMOBILES.

1. Testimony in an action for the negligent injuring of an infant, of almost seven years of age, that she started to cross a paved avenue in the city of Detroit between two streets, where there was no regular crossing, that she failed to look for approaching vehicles, that defendant's car, in charge of an experienced driver, was passing at a moderate rate of speed (from 7 to 9 miles per hour), and the driver who was watching for persons, etc., in the way blew his horn, got his feet on the brake and clutch, grabbed the emergency brake, and stopped as quickly as his car could stop, and turned to one side, as soon as she stepped into the street from behind a standing horse and wagon, that when the child went upon the pavement, she was only 20 to 25 feet in advance of the car, which defendant's testimony tended to show was less than that distance from her, *held*, insufficient to raise an inference of negligence on the part of the chauffeur. *Barger* v. *Bissell*, 366.

2. Though the question of contributory negligence of a little girl, 6 years, 10 months of age, is in most cases for the jury, the conduct of the infant in unexpectedly attempting to cross a paved avenue, in the middle of the block, may be considered and has a proper bearing on the question whether defendant was guilty of negligence as a matter of law. *Id.* 367.

3. In order to entitle the plaintiff to rely on the claim of negligence that the driver had no license to operate a car, the point must be alleged and relied upon in his declaration. *Id.*

Digitized by Google

AUTOMOBILES—Continued.

4. In an action for personal injuries of a female infant under seven years of age, no presumption that the driver of the automobile that caused her injury was guilty of negligence is raised by mere proof of the accident. *Id.*

BANKRUPTCY—See USE AND OCCUPATION (1).

BENEFICIAL ASSOCIATIONS—See EVIDENCE (13); INSURANCE (2).

BILL OF COMPLAINT—See BOUNDARIES (3).

BILL OF LADING—See CARRIERS (10).

BILLS AND NOTES.

Where the insured notified plaintiff, a general insurance agent, that he would not continue in force an insurance policy, but told him to see defendant, who was interested as beneficiary or otherwise, who could continue it if she wanted to, and defendant gave plaintiff a check and received the premium receipt therefor, the effect was to continue in force the policy, notwithstanding defendant's subsequent attempt to repudiate the policy by stopping payment of the check, where she failed to return the receipt and policy, and in an action for the amount of the check, a verdict was properly directed for plaintiff. *Zacharias* v. *Donaldson*, 443.

See PRINCIPAL AND SURETY (1); TENDER (2).

BOARD OF POOR COMMISSIONERS—See MUNICIPAL CORPORATIONS (2).

BONDS—See COMPROMISE AND SETTLEMENT (1); EQUITY (3); INTOXICATING LIQUORS (3); PRINCIPAL AND SURETY (3, 4).

BOUNDARIES.

1. In a suit to establish a boundary line and quiet title to land, brought under section 11965, 4 How. Stat. (2d Ed.), evidence examined, and *held*, to establish the existence of the boundary line, as at present occupied by a fence, for more than 20 years, and a decree for complainant is affirmed. *Parent* v. *Hodges*, 69.

2. While it is recognized that courts of equity may pass upon or locate boundary lines as an incident of issues properly within chancery jurisdiction, the rule is well settled that they have no inherent and independent jurisdiction to determine the true location of disputed boundaries. *Weissert* v. *Fuller*, 327.

3. In a suit to quiet title to a strip of land, 2½ feet in width, lying between complainant's lot and an adjoining parcel, the bill which asked for no distinctively equitable relief and claimed no land except that to which she was entitled under her conveyance, was open to the objection that

Digitized by Google

BOUNDARIES—Continued.

complainant had an adequate remedy at law, and the averments of the bill as to possession in complainant having been denied, the trial court properly dismissed the proceeding. *Id.*

BREACH OF CONTRACT—See DAMAGES (5); EQUITY (7).

BREACH OF POLICY—See INSURANCE (4).

BROKERS.

In an action by a broker to recover a commission agreed to be paid to him for procuring a tenant of real property, where there is no evidence that the proposed tenant was ready, willing, and able to carry out the terms of his offer, plaintiff is not entitled to recover. *Morgan* v. *Zanger*, 212.

BUILDING CONTRACT—See CONTRACTS (4).

BUILDING RESTRICTIONS—See DEEDS (1, 6, 7).

BURDEN OF PROOF—See INSURANCE (6); PARTNERSHIP (4); TAXATION (4, 10); TRIAL (17).

CANCELLATION OF INSTRUMENTS—See PARTNERSHIP (1, 2, 4); TRUSTS (7).

CANCELLATION OF SHERIFF'S DEED—See EQUITY (1).

CARRIERS.

1. In an action against a railroad company by an infant 13 years of age for injuries received by being carried past his destination, and having to walk back a distance of nearly eight miles, in a storm, evidence that plaintiff's father purchased a ticket for him from the agent of another railroad, who was authorized to sell the same; that the ticket asked for was to Linwood, and the ticket received was to Linwood Park; that the conductor of defendant's train accepted the ticket without objection and promised to tell him when the train reached the station; that the defendant's brakeman told plaintiff when he got on that the train went to Linwood, *held*, sufficient to establish a contract to carry plaintiff to Linwood Park. *Moss* v. *Railway Co.*, 1.

2. It cannot be said, as matter of law, that plaintiff, at his age, in a strange place, and without any instruction from defendant's employees, or any one else, was guilty of contributory negligence in not stopping at some house instead of continuing his journey on foot to his destination. *Id.*

3. Where the evidence showed that plaintiff, who had previously been in good health, was suffering from cold and exhaustion when he reached his destination, gradually growing worse until pneumonia set in, and no exposure or cold, other than the one alleged, is shown by the testimony, the court was justified in submitting to the jury the

Digitized by Google

CARRIERS—Continued.

question whether plaintiff's illness from penumonia was a proximate result of defendant's negligence. *Id.* 2.

4. Although plaintiff would have had a considerable distance to walk to his destination, and it is impossible for the jury to determine what share of his illness was caused by the increased distance in being carried past the station, it was not error for the court to submit the question of damages to the jury, under proper instructions; this being an action in the nature of tort. *Id.*

5. In a suit for personal injuries caused by falling down an elevator shaft, where there was evidence to support plaintiff's theory, and the questions at issue were submitted to the jury under proper instructions, the verdict and judgment will not be set aside as against the great weight of the evidence. *Rogers* v. *Ford*, 62.

6. In a suit against the consignees and the carrier for the conversion of a car load of hair, where the consignees refused payment on the ground that they never received the goods, and the railroad company claimed that the car was placed on consignees' siding on April 22d, that on April 24th it was about three feet from the receiving door of consignees' plant, that it had not then been unloaded, and that on April 25th it was in the same place and empty, evidence *held*, to justify a verdict against the consignees and in favor of the railroad company. *Austin* v. *Knell*, 100.

7. Navigation companies are within the class entitled, under Act No. 300, Pub. Acts 1909, to make complaint to the Michigan Railroad Commission praying for the establishment of through routes and joint rates for passengers upon railroads between designated points, and the fact that the commission has no jurisdiction over water lines is immaterial. *Grand Rapids, etc., R. Co.* v. *Railroad Com'n*, 108.

8. Where the conclusion arrived at by the commission is justified by the testimony, this court will not, on appeal, substitute its judgment for that of the commission. *Id.*

9. In proceedings by a railroad company for the vacating of an order issued by the Michigan Railroad Commission for the establishment of through routes and joint rates by complainant and another railroad between points on both lines, where complainant's line, after reaching a certain point, runs nearly at right angles to the other railroad, and does not originate its traffic in the same general territory as the other road, the order of the commission will not be set aside on the ground that there is already a satisfactory route through the same territory. *Id.* 109.

10. In an action for the wrongful delivery of a car of wheat and a car of beans consigned to the order of Botsford & Barrett by bills of lading, signed respectively "Botsford & Barrett, per F. M. G., Shipper, Lapeer Grain Co., Churchill"

Digitized by Google

CARRIERS—Continued.

and "Botsford & Barrett, per C., Shipper, Lapeer Grain Co., Churchill," the signatures indicating that the Lapeer Grain Company and Botsford & Barrett were shippers, their indorsement was necessary to a legal delivery and plaintiff could recover for delivery made by the final carrier on a forged signature to the bill of lading. *Churchill* v. *Railway Co.*, 376.

See CUSTOMS AND USAGES; DAMAGES (2, 4).

CAVEAT EMPTOR—See TRIAL (18, 19).

CHANGE OF VENUE—See CRIMINAL LAW (6, 7).

CHARGE—See TRIAL (13, 14).

CHARTERS—See MUNICIPAL CORPORATIONS (4).

CHECK, STOPPAGE OF PAYMENT OF—See BILLS AND NOTES.

CITIES—See MUNICIPAL CORPORATIONS (1, 2, 5).

CIVIL ACTION—See CRIMINAL LAW (2).

CIVIL SERVICE—See MUNICIPAL CORPORATIONS (2, 4)

CLAIM—See WORK AND LABOR (2).

COLLATERAL ATTACK—See EQUITY (3).

COMMISSIONS—See BROKERS.

COMMITMENT—See CRIMINAL LAW (3).

COMMON COUNTS—See ASSUMPSIT, ACTION OF (1).

COMPARATIVE NEGLIGENCE—See MASTER AND SERVANT (9, 16, 24).

COMPENSATION—See WORK AND LABOR (1).

COMPETENCY—See DEEDS (2-4).

COMPLIANCE WITH STATUTE—See NAMES (2).

COMPROMISE AND SETTLEMENT.

1. Where a contractor, engaged in constructing a public building, became financially involved, and, at a meeting of his creditors, offered to give 3-year notes for his various accounts and some of the creditors or their representatives were not present, but others who were at the meeting expressed their willingness to grant the request if all would join in doing so, there was insufficient evidence to entitle the debtor's surety on his construction bond to a directed verdict upon the ground of a compromise and extension of time. *People* v. *Traves*, 345.

2. The testimony of defendant that, when he had made a proposition to his creditors, at a meeting, to give them

Digitized by Google

COMPROMISE AND SETTLEMENT—Continued.

3-year notes for his indebtedness, they agreed to it, was incompetent as proof of their consent and the trial court did not err in striking from the record that part of his statement relating to the alleged agreement, as a conclusion, where he afterwards admitted that some of his creditors were not present and that he was not sure that one of those who was present expressed his consent. *Id.*

3. Nor was it erroneous to strike out the testimony of another witness who was at the alleged meeting of creditors and stated that he went away with the impression that everybody present at the meeting would accept defendant's proposition, and that most of the creditors seemed to be satisfied; the court granting an opportunity to counsel to show what the actual facts were and what took place. *Id.*

4. In proceedings against a decedent's estate to secure compensation for personal injuries, defendant estate claimed that the injured employee had accepted $250 in full settlement and satisfaction, and had executed a release under seal for his broken leg. The limb, failing to knit, claimant attempted to repudiate the settlement and recover for his injury, which resulted in amputation, charging the physicians with fraudulently misrepresenting to claimant his true condition. He made no complaint of the alleged fraud during upwards of twenty months after the date of the release. Claimant was advised of the falsity of this alleged medical advice within a few days after his executing the release, when his leg was amputated. Another writing was executed by claimant within a few weeks of the injury, and just before the operation, referring to the compromise and expressly confirming it. Claimant was over 40 years old. He could read and write and was intelligent. *Held*, that he had ratified the release by long acquiescence and could not repudiate it for fraud after so long a period. *Burns* v. *Estate of Reading*, 591.

5. One who seeks to rescind a compromise for fraud must act promptly after discovering the wrong and must return the consideration received in full. *Id.*

CON-ASSOCIATION RULE—See MASTER AND SERVANT (6).

CONCLUSIONS OF WITNESS—See COMPROMISE AND SETTLEMENT (2, 3); EVIDENCE (7).

CONDITIONAL JUDGMENT—See CONTRACTS (5).

CONDITIONAL SALES—See SALES (2, 3).

CONDITIONS PRECEDENT—See INSURANCE (2).

CONDUCT OF COURT—See TRIAL (8).

CONFLICT OF LAWS—See WITNESSES (4).

Digitized by Google

CONJECTURE—See CARRIERS (4).

CONSIDERATION—See FRAUDULENT CONVEYANCES (4); TRUSTS (3).

CONSPIRACY—See CRIMINAL LAW (7).

CONSTITUTIONAL LAW.

1. Act No. 63, Pub. Acts 1901, providing that if the time of redemption from a sheriff's sale had elapsed before the taking effect of the act, a deed might be given within five years from the time the act shall take effect, and that when such deed is not taken and recorded within the time limited, the certificate of purchase shall become null and void, is not unconstitutional as depriving an execution purchaser of his property without due process of law, as his rights previous to deed are inchoate and confer no beneficial use of the premises; defendant's deed, not having been executed by the sheriff until after the expiration of the five years limited by the statute, is null and void. *Pike* v. *Halpin*, 447.
2. As to the effect of failure of the execution purchaser to record the deed within five years which had been taken out within that period,—*quære*. *Id.*
3. Act No. 10, Extra Session 1912, as amended, bringing all municipal corporations of the State within the provisions in the statute establishing workmen's compensation, is not in excess of the recognized powers of the legislature, which has been held in several cases arising in different States to have authority to abolish the common law defenses of contributory negligence and assumed risk and to abrogate the fellow-servant rule. *Wood* v. *City of Detroit*, 547.
4. Nor is the statute unconstitutional because it affects municipal corporations differently from private corporations, in that private corporations are permitted to elect whether or not they shall become subject to the law, while municipal corporations have no option. The classification so created is not invalid, and does not deprive a municipal corporation of the equal protection of the laws. *Id.*
5. Under the new Constitution the right of local self government granted to municipal corporations does not deprive the legislature of its authority to regulate such public instrumentalities by general enactments affecting their private governmental functions. *Id.* 548.
6. No constitutional right of the corporation is infringed because the statute compels the municipality to respond in damages to servants who may have been injured without fault of the employer: since the legislature has the power to determine on what terms municipal corporations shall be allowed to engage in the employment of labor, if at all, the collective and individual rights of the citizens being duly preserved. *Id.*

See CRIMINAL LAW (5); MUNICIPAL CORPORATIONS (5, 6); TAXATION (13, 14).

Digitized by Google

CONSTRUCTION OF CONTRACT—See CONTRACTS (2).

CONSTRUCTION OF DEED—See DEEDS (5, 6); MORTGAGES (1).

CONSTRUCTION OF STATUTE—See NAMES (2); STATUTES.

CONSTRUCTIVE NOTICE—See PRINCIPAL AND AGENT (10).

CONSTRUCTIVE TRUSTS—See TRUSTS (4-6).

CONTEMPT—See APPEAL AND ERROR (3); DIVORCE (1, 4); MORTGAGES (3).

CONTRACTS.

1. Where plaintiff sold defendant an acetylene gas generator and certain fixtures by written contract, and agreed orally to install the same, and after the generator was delivered and partly installed defendant refused to allow him to finish, plaintiff is entitled to recover the contract price of the generator, and for such pipe and materials as had been used, at the contract price. *John S. Noel Co.* v. *Newcomb*, 53.

2. Where defendant sold his elevator and warehouse and agreed not to "build any elevator nor directly or indirectly engage in the elevator or grain business, except for the purpose of buying grain to be ground at his mill," his subsequent action in installing machinery in his mill for the purpose of cleaning and handling beans, and engaging in the business of buying beans, was in violation of his contract not to engage in the elevator business, although previous to the sale he had not engaged in buying and selling beans. *Bottomley* v. *Brown*, 134.

3. In the absence of fraud, such agreement to refrain from re-engaging in the elevator business in a little community where one elevator was useful and two could not probably survive, although the contract did not refer to the sale of the good will of the business, is not void as against public interest. *Id.* 135.

4. A contractor, who is wrongfully excluded from the building by the owner, is entitled to recover any sum due him under the contract, if the issue is properly presented, in injunction proceedings by the owner to restrain him from interfering with her possession. *La Tour* v. *Hibbler*, 140.

5. But where the contractor failed to answer complainant's bill, and was defaulted, and defendant intervened as assignee of only a portion of the contractor's rights, and was awarded a decree under his cross-bill, the decree will be affirmed only on condition that complainant is released from all claims under the contract. *Id.*

See CARRIERS (1); COMPROMISE AND SETTLEMENT (1); DAMAGES (3); EQUITY (5, 7, 8); EVIDENCE (6, 12); MASTER AND SERVANT (19; NAMES (2); PARTNERSHIP (1-3); SALES (1, 3, 5, 6); TRUSTS (1); USE AND OCCUPATION (1, 2); WORK AND LABOR (1, 3).

Digitized by Google

CONTRIBUTORY NEGLIGENCE—See AUTOMOBILES (2); CARRIERS (1, 5); INFANTS; MASTER AND SERVANT (14, 21-23); RAILROADS (4).

CONVERSION—See CARRIERS (6); SALES (4); TRIAL (17).

CORONER'S VERDICT—See EVIDENCE (13).

CORPORATIONS.

"Watered" or fictitious stock is stock that is issued as fully paid up when, in fact, the whole amount of the par value thereof has not been paid in, or which purports to represent, but does not represent, in good faith, money paid into the treasury of the company, or money's worth actually contributed to the working capital of the concern. *Loud* v. *Solomon*, 8.

See CONSTITUTIONAL LAW (4); EVIDENCE (1, 2); FRAUD (1); MASTER AND SERVANT (19); RELEASE (1, 2).

COSTS—See VENDOR AND PURCHASER (2).

COURTS—See CRIMINAL LAW (5); DIVORCE (9); MASTER AND SERVANT (22).

COVENANTS—See DEEDS (5).

CRIMINAL LAW.

1. Where the people had proved that deceased was pregnant, that an abortion had been committed, and that it caused her death, and where the relations of respondent and deceased supported an inference that he knew her condition, that she would not have an operation performed without his knowledge, and that he was cognizant of the crime, evidence that on the night she left her home and remained away she seemed in good health and spirits, and said that she was going to meet respondent, was admissible as verbal acts accompanying her going away, and whether they truthfully explained her conduct and purpose was for the jury. *People* v. *Atwood*, 37.

2. The enforcement of section 5912, 2 Comp. Laws, forbidding shows, work, etc., on Sunday, under a penalty of not more than $10, must be by a civil action to collect the penalty: the act of conducting a moving picture show on Sunday does not amount to a misdemeanor and may not be prosecuted by an indictment; nor did the assemblage of the parties owning or operating the theatre and 30 or more persons in such theatre for the respective purposes of conducting and witnessing the exhibition of moving pictures and the refusal of such persons to disperse as commanded by the sheriff amount to a violation of section 11334, 3 Comp. Laws, relating to riots and unlawful assemblages, so as to bring the violators within the authority for summary arrest provided for by that statute, in the absence of disorder, violence, or breach of the peace. *People* v. *Dixon*, 307.

Digitized by Google

CRIMINAL LAW—Continued.

3. Under a sentence that the accused be confined in prison for a period of not less than ten years, the court recommending imprisonment for life, the order should be construed as fixing a maximum term of ten years, and the minimum be held to be fixed by statute at five years, the court clearly intending that his sentence should not be conclusive on the governor or pardon board: hence the accused was not entitled to his discharge because of the irregularity of the sentence or commitment. Act No. 184, Pub. Acts 1905, § 3. *In re Hamilton*, 499.

4. As it is impossible to fix a minimum sentence, in the case of life imprisonment, that would equal one-half of the maximum term, there can be no minimum sentence as to life prisoners, to comply with the proviso in section 3 of the statute. *Id.*

5. Under the provisions of statute relating to the summoning of additional jurors, more than 24 petit jurors being needed for a criminal trial, in the opinion of the presiding judge, the court is not permitted to designate prior to the commencement of the term a portion of the county from which the additional jurors should be selected, excluding the city in which the alleged offense took place and certain adjacent territory. 1 Comp. Laws, §§ 340, 342. The accused is entitled to a trial by a jury of the vicinage or locus of the crime with which he was charged, and failure to recognize this right invaded the constitutional privilege of the said respondent. *People* v. *Gage*, 635.

6. The discretionary power vested in the circuit judge to allow or deny a change of venue is only reversible on appeal in case of abuse, but the discretion recognized by the court is not a personal, arbitrary discretion, being rather a legal discretion to be exercised according to established and well known principles of law. *Id.* 636.

7. Defendant was informed against for embezzlement and illegal conduct in the operation and failure of a private bank. The failure of the bank caused much excitement and public feeling. Various litigation arose over the firm affairs. On the hearing of a motion for change of venue, the trial court granted the request, but the cause coming on at a subsequent term, the order being treated as premature and irregular, a second motion was made and denied by the judge, who was of the opinion that sufficient time had elapsed so that public feeling and interest was less intense, and that a fair trial could be secured in the county. But during the intervening period political discussion took place regarding the bank failure and the evidence showed that the issues were kept alive and agitated. *Held*, that a change of venue should be granted, and it was error to find that sentiment had so changed in the county as to afford an opportunity for an impartial trial. *Id.*

See WITNESSES (3).

Digitized by Google

CROSS-EXAMINATION—See WITNESSES (5).

CROSSINGS—See RAILROADS (2).

CURING ERROR—See APPEAL AND ERROR (4).

CUSTOMS AND USAGES.

Evidence that it was the custom of the railroad company to place car load lots, consigned to defendants, on the spur track immediately adjacent to their plant, was admissible on the question of delivery. *Austin* v. *Knell*, 100.

See EQUITY (6); EVIDENCE (12).

DAMAGES.

1. Whether the damages alleged in a particular case are the proximate results of the injury, is usually a question of fact for the jury. *Moss* v. *Railway Co.*, 1.

2. Where plaintiff, an infant 13 years of age, brought an action for injuries caused by severe cold and resulting pneumonia, contracted by exposure and exhaustion in reaching his destination on foot after being carried past his station by defendant's train, necessitating an operation and large quantities of pus taken from his side, from which he had not fully recovered at the time of the trial, a verdict for $600 cannot be said to be excessive. *Id.* 2.

3. In an action to recover for alleged fraudulent representations in the sale of land, it was error for the court to charge the jury that the measure of damages was the amount of money paid by the plaintiff, with interest, where there was no evidence that the contract was ever rescinded by the plaintiff and tendered back to defendant; under the pleading and evidence the measure of damages was the difference between the value of the land as represented and what it was actually worth. *Haener* v. *McKenzie*, 28.

4. In an action for personal injuries caused by falling down an elevator shaft, causing plaintiff, a police captain, much pain and suffering, and possible permanent injury, a verdict for $2,250 will not be set aside as excessive. *Rogers* v. *Ford*, 62.

5. The measure of damages for the breach of a contract of sale is the difference between the contract price of the goods and what they would cost the buyer at the time of the breach, and it is not necessary, in order to recover, that he actually purchase the goods. *Rockford Malleable Iron Works* v. *Tilden*, 80.

6. A judgment for the full amount claimed in the bill of particulars, which is not warranted by plaintiff's evidence, is excessive. *Salmer* v. *Hicks*, 391.

Digitized by Google

DAMAGES—Continued.

7. There was no abuse of the discretion vested in the trial court in denying defendant a new trial on the ground of excessive damages upon testimony tending to show that his expectancy was upwards of forty years, and that the arm was crooked, the verdict amounting to $2,250, in a malpractice suit. *Wilk* v. *Black*, 478.

See APPEAL AND ERROR (5); CARRIERS (3, 4); CONSTITUTIONAL LAW (6); CONTRACTS (1); MASTER AND SERVANT (24); TRIAL, (10, 11); VENDOR AND PURCHASER (3).

DEATH—See MASTER AND SERVANT (3, 9); NEW TRIAL; RAILROADS (7).

DEATH CERTIFICATES—See INSURANCE (3).

DEBTOR AND CREDITOR—See COMPROMISE AND SETTLEMENT (1); SALES (2).

DECLARATION—See JUSTICES OF THE PEACE.

DECREES AND ORDERS—See DIVORCE (6).

DEEDS.

1. Where there were no restrictions in any of the title deeds to the lot defendant purchased, on the north side of a street, and he had no notice that the residents on the south side were restricted or considered the street a restricted district, and he was assured, if he bought the lot, he would have a perfect right to put up an apartment house, equity will not enjoin the building of a brick two-story four-family apartment house. *Williams* v. *Lawson*, 88.

2. In reviewing, on appeal, a decree of the circuit court involving issues of fact relative to the validity of a deed of decedent to his daughter, evidence considered in the light of the presumptions arising from the opportunity possessed by the circuit court to hear and see the witnesses, and *held*, to sustain the validity of the conveyance. *Akers* v. *Mead*, 277.

3. In order to sustain a deed it is not essential that absolute freedom from influence should appear; the question being whether such influence was exerted as to take away the grantor's freedom of disposition. Weakness of mind or forgetfulness are not sufficient to invalidate a will or deed, if it appears that the mind of the grantor was capable of attention and exertion when aroused and was not imposed upon. If capacity exists the court will not undertake to measure the degree of the capacity. Eccentricity, unless it take the form of monomania, will not incapacitate one from making a valid conveyance or will. *Id.*

4. Testimony that decedent grantor was affected with a disease which caused dizziness and mental weakness and made him forgetful, met by the testimony of numerous

Digitized by Google

DEEDS—Continued.

friends and acquaintances that he was capable of transacting business though he showed the effects of advanced age, that at the time of executing a deed to his daughter he was 76 years of age, and was treated by complainants as competent until he entered into a marriage that was displeasing to them, *held*, to warrant the decree and finding of the circuit court sustaining the deed of his homestead to his daughter. *Case* v. *Bogart*, 297.

5. A conveyance of a city lot with the restriction that it should be used for residence purposes only, limiting the height of buildings to two stories and fixing the cost, distance from street, etc., did not exclude the erection of an apartment house; and no further or different limitations to those expressed in the deed might be implied. *Casterton* v. *Plotkin*, 333.

6. Such restrictions are construed strictly against the grantor and those claiming to enforce them, all doubts being resolved in favor of the free use of the property. *Id.*

7. Where the owner of a parcel of land sold part of the property subject to building restrictions limiting its use to residence purposes only and not expressly providing that only single dwelling houses should be erected on each lot, and where no deed in defendant's chain of title contained such restriction, although it appeared that other conveyances in the block had been interpreted by the owners of the property as excluding apartments and business structures, and where defendant was not shown to have had notice of complainants' claim that all the property along the block was subject to such restriction, the court erred in restraining defendant from erecting an apartment house upon his land, since no acts of the grantor in the original conveyance, done subsequently to the purchase by complainant or his predecessors in title, could affect his rights under the conveyance. *Id.*

8. It is not a general rule recognized by the courts that the mere construction of single dwellings or adoption of any particular style of architecture is notice to the owner of a lot within the block or neighborhood that the property is all restricted to residential or other purposes. *Id.* 334.

9. Proof that the defendant necessarily observed that the street on which his lot faced was a residence street of single houses on each lot and that no business places or apartments fronted thereon, that other proprietors adjoining his property observed the rule of restriction, was not notice which would charge the defendant with information that a general plan of restrictions had been adopted for the street which would be binding upon him, especially upon his express testimony that the agent who sold him the property told him it was not restricted and could be used for business purposes, and that the attorney who examined his abstract advised him that he might build an apartment

Digitized by Google

DEEDS—Continued.

upon the lot as he intended, when he made the purchase. *Id.*

10. The rule that parol restrictions control all lots in a subdivision that has been platted under a general plan and consistently carried out as to all property and accepted by all persons in interest is not applicable to persons not participating in the acts or declarations of those platting it but acquiring the property prior to such parol declarations or limitations. *Id.*

11. The mere fact that the conduct of defendant in relation to the property was open to criticism was not sufficient reason in equity for enjoining him from constructing an apartment house, in the absence of sufficient evidence that he had clearly violated restrictive conveyances in the chain of title: courts of equity will not aid complainant in restraining the use of another's property unless the right to the restraining order is plain. *Id.*

See EQUITY (1); FRAUDULENT CONVEYANCES (3); MORTGAGES (1); TAXATION (10, 12, 14); TRUSTS (7).

DEFAULT—See CONTRACTS (4); TENDER (1).

DEFECTIVE NOTICE—See TAXATION (8).

DEFINITE CONTRACT—See EQUITY (7).

DELEGABLE DUTY—See MASTER AND SERVANT (4).

DELIVERY—See CARRIERS (6, 10); CUSTOMS AND USAGES; EVIDENCE (10, 11); FRAUDULENT CONVEYANCES (3).

DEMURRER—See JUSTICES OF THE PEACE.

DEPOSITIONS—See EVIDENCE (1).

DESCENT AND DISTRIBUTION—See TAXATION (5).

DESCRIPTION OF LAND—See TAXATION (7, 8).

DETROIT CHARTER—See MUNICIPAL CORPORATIONS (2, 3).

DIRECTED VERDICT—See APPEAL AND ERROR (5); BILLS AND NOTES; MASTER AND SERVANT (1, 5, 23, 24); PARENT AND CHILD (1); RAILROADS (5); STREET RAILWAYS (1); TRIAL (5, 12, 14); WORK AND LABOR (4).

DISCOVERY—See TRUSTS (12).

DISCRETION—See CRIMINAL LAW (6); WITNESSES (1, 5).

DISCRETION OF TOWNSHIP BOARD—See INTOXICATING LIQUORS (2).

DISMISSING BILL—See DIVORCE (6).

DIVISION OF PROPERTY—See DIVORCE (2).

Digitized by Google

DIVORCE.

1. A sum awarded to the wife by the court, on granting her a divorce, in pursuance of an agreement between the husband and wife, after their separation, whereby he was to pay her a certain sum monthly, and intended for her support and maintenance out of her husband's estate, is alimony, the payment of which may be enforced by contempt proceedings. *Mesler* v. *Circuit Judge*, 195.

2. "Permanent alimony" is a provision for the support and maintenance of a wife out of her husband's estate during her lifetime, ordered by a court on decreeing a divorce; "alimony" being essentially a different thing from a division of property of the parties. *Id.*

3. The equity court has jurisdiction, in an action for divorce, where the petition contains a prayer for general relief, to adjust and settle the rights of the parties with respect to the nature and amount of the alimony, and, in doing so, to confirm any agreement of the parties that is just and reasonable, and not the result of fraud and coercion. *Id.* 196.

4. Act No. 230, Pub. Acts 1899, authorizes contempt proceedings in divorce cases. *Id.*

5. An award of alimony ordering defendant to pay a certain sum monthly is a personal decree, and not necessarily an interest in property, and is not in conflict with the underwriting on the subpœna served on defendant in the divorce suit, reciting that a personal decree was sought against him and that the bill was not filed to reach interests in property. *Id.*

6. Leave of the court must ordinarily be obtained to dismiss a proceeding in equity, and in divorce proceedings, particularly, in which the public frequently is concerned, the rule should not be relaxed. *Allen* v. *Allen*, 532.

7. From the fact that a motion for temporary alimony was denied it could not be implied that the court consented to the dismissal. *Id.*

8. Upon reviewing the testimony, the finding of the trial court that complainant had retained his domicile in Michigan, during his sojourn in Alaska, is affirmed. *Id.*

9. Where complainant filed a bill for divorce in Genesee county, to which defendant filed her cross-bill, and complainant later went to Alaska, and secured a decree of divorce there, the Genesee circuit court which first obtained jurisdiction retained the same and could enter a valid decree for defendant under her cross-bill. *Id.*

10. And the complainant's failure to deny his wife's charges of extreme cruelty, although the court gave him an opportunity to take the stand and rebut her testimony, tended to corroborate her claims, though otherwise unsupported. *Id.*

Digitized by Google

DIVORCE—Continued.

11. An award of $3,000 alimony and $400 solicitor's fees, and $3.00 a week for the support of the infant until it should become 14 years of age, out of property worth $5,500 which defendant did not help to accumulate, *held* excessive and reduced to $1,000 permanent alimony, $200 solicitor's fees and $3 per week for the child until it should become 14 years old. *Id.*

See AMENDMENTS.

DOMICILE—See DIVORCE (8).

DRAINS.

Where the drain traversing complainant's land requires a new outlet, which will be furnished by a proposed improvement of a natural water course in another county, complainant's contention, in injunction proceedings to restrain defendant from assessing his land for said improvement, that his land will not be benefited because it is higher than said water course and already sufficiently drained, cannot be sustained. *Hynes* v. *Barrett*, 154.

DUE PROCESS OF LAW—See CONSTITUTIONAL LAW (3).

DURESS—See INTOXICATING LIQUORS (1).

DUTY TO WARN—See RAILROADS (8).

DUTY TO WHISTLE—See MASTER AND SERVANT (15).

EASEMENTS—See TAXATION (9).

EJECTMENT—See EVIDENCE (17); TAXATION (14); TRIAL (17).

ELEVATORS—See CARRIERS (5); CONTRACTS (2, 3); DAMAGES (4); MASTER AND SERVANT (10).

EMBEZZLEMENT—See CRIMINAL LAW (7).

EMPLOYERS' LIABILITY ACT—See CONSTITUTIONAL LAW (3); MASTER AND SERVANT (13, 21, 25); MUNICIPAL CORPORATIONS (5).

EQUITY.

1. Equity will not interfere to set aside a deed of real property sold by the sheriff on execution issued out of the circuit court upon a transcript of judgment rendered in justice's court in favor of defendant, where it appears that defendant acted in good faith in the proceedings before the justice, and that the garnishee summons was personally served upon an officer of complainant and an opportunity given to urge any defense it had. *Lafayette Benevolent Society* v. *Richardson*, 57.

2. Where defendants were charged by the bill of complaint with committing a simple trespass, in that they entered upon an island, consisting of two acres and upwards of

Digitized by Google

EQUITY—Continued.

land, proceeded to construct a house or similar structure upon it, the remedy of complainant was properly an action at law, not a suit in equity for an injunction to restrain the unlawful acts of defendants which were not shown by the bill to have constituted an injury to the freehold. *Hendershott* v. *Moore*, 364.

3. Plaintiff brought an action upon a judicial bond given in chancery proceedings that he had instituted to have a receiver appointed for crops grown upon lands held by the obligor, his tenant. Defendant had taken his appeal from the order of restitution of the circuit court commissioner and had given an appeal bond in the sum of $1,200. The crops were worth over $1,900, and the landowner, deeming the bond insufficient, asked for a receiver. By the decree, upon complainant's bill therefor, a receiver was appointed by the court to take possession of any crops that might be grown on the premises unless the tenants should furnish a sufficient bond, as security, which defendant filed. Defendant contended that it was invalid because the court had no jurisdiction, the remedy at law being adequate and complete, and that the order appointing a receiver was void, for want of equitable authority. *Held*, that the court did not exceed its jurisdiction and that the bond was valid, that the order for a receiver was also within the equitable power of the court, and, no appeal having been taken, was not subject to collateral attack. *Parsille* v. *Brown*, 485.

4. Although the court of equity retains jurisdiction of controversies for which the court of law may afford adequate relief, when involved with or growing out of an equitable cause, that confers jurisdiction upon the court in chancery, the bare pleading in conjunction with such issues of equitable rights not sufficiently proved does not give equity the right to try a controversy of otherwise exclusive law jurisdiction: the legal remedy administered in chancery must be connected with and grow out of an equitable right. *Schook* v. *Zimmerman*, 617.

5. Complainant, a liquor dealer, claimed that defendants visited his saloon during a storm and inquired about mining properties in the neighborhood, saying that they were looking for a mine and informing complainant that they had no expectation of securing it for nothing, and that if he could find them a workable mine, they would "whack" with him. He directed them to certain mineral lands which proved to contain valuable deposits, and defendants secured the property and developed it under a royalty contract. *Held*, in a suit for specific performance of the alleged agreement, that complainant's remedy, if any, was at law, that no such definite contract as the court of equity must find was proven and that no fiduciary relation existed such as would give complainant a right to an accounting, or to follow the profits as a trust. *Id.* 618.

Digitized by Google

EQUITY—Continued.

6. Proof of a custom to pay a definite percentage of the profits could not bind defendants, who were not shown to have notice or knowledge of a usage of the kind averred. *Id.*

7. Though an action at law may be maintained for breach of contract, some of the terms of which have not been established with exactitude, it is otherwise in proceedings for specific enforcement, which require a greater degree of certainty than do actions for damages. *Id.*

8. The term "whack" claimed to have been used in the negotiations between the parties could not support specific enforcement, which can only be decreed if the intent of the parties is manifest; and, as the phrase ordinarily means to divide into shares, apportion, square accounts, or pay, the proportion to which either was entitled was conjectural. *Id.*

See AMENDMENTS; BOUNDARIES (2, 3); DEEDS (1, 11); DIVORCE (3, 6); FRAUDULENT CONVEYANCES (2); PARTNERSHIP (1, 2); SPECIFIC PERFORMANCE (1); TAXATION (3, 6); TRUSTS (5, 10, 11); VENDOR AND PURCHASER (2).

ESCROW—See TRIAL (15).

ESTABLISHING ROUTES AND RATES—See CARRIERS (7, 9).

ESTATES OF DECEDENTS—See APPEAL AND ERROR (7); TAXATION (5); WORK AND LABOR (2, 4).

ESTOPPEL—See TENDER (4); TRUSTS (9).

EVIDENCE.

1. A deposition of a mining engineer, offered in evidence for the purpose of showing that other plants in the immediate vicinity, started on the same plan as the corporation in which defendant purchased stock, were being successfully operated, to substantiate the representations that there was no water in the stock, that the company was well financed, and that the value of the land made the stock worth $3.50 a share, the purchase price, was inadmissible, where it does not appear from the deposition that any questions were asked as to the manner of financing the neighboring companies, the valuation which they placed upon the land taken, or the scheme of their stock issues generally, so as to show that the stock issues of those companies were not watered. *Loud* v. *Solomon*, 8.

2. Where defendant claimed that it had been falsely and fraudulently represented to him, in the sale of stock, that the company had been fully financed, it was not error for the court to exclude a question as to whether the company, with $3,500 in cash available, and its 400 acres of land paid for, could be made a practical or feasible scheme by the sale of stock as the plant progressed, as it could not

Digitized by Google

EVIDENCE—Continued.

be said that the answer would show that the company had been fully financed, where its success depended upon the uncertainty of stock sales. *Id.*

3. Where the facts shown by the record were otherwise proved, or admitted by respondent, its introduction was not reversible error. *People* v. *Atwood*, 37.

4. Where the probate clerk and judge testified as to conversations with, and statements of, respondent before the marriage, their evidence was not confined to the subjects indicated in the orders, and was prejudicial, notwithstanding that said marriage was admitted and otherwise proved, and that respondent admitted he was the father of the child, and was at the time unwilling to marry its mother. *Id.*

5. Where no proper objection was made in the court below that respondent had a privilege which was being violated by the admission of such testimony, and the only objection made in this court is that such orders could not lawfully be made upon the application of the prosecuting attorney, respondent is *held* to have waived the privilege. *Id.*

6. In an action to recover damages for alleged fraud in the sale of a gasoline engine to plaintiff, parol evidence of conversations between plaintiff and the agent of defendant prior to and at the time the order was signed is inadmissible to vary the terms of a written contract of sale containing a warranty limiting the seller's liability to return of the purchase price in case the engine proved defective, and defendant was properly notified and given opportunity to put in good order. *Mishler* v. *International Harvester Co.*, 104.

7. In an action for personal injuries caused by a runaway horse, testimony of the driver that the horse was not a quiet horse, that he was a bad actor, was nervous, and would start off with every little sound, was not inadmissible as a conclusion of the witness, but may be said to be a statement of a fact, since he stated in detail the conduct of the horse. *Dyer* v. *Ice Co.*, 203.

8. Evidence of the driver that he had, prior to his taking charge of the horse, heard that he was a bad actor and had run away, was admissible as tending to show notice of the vicious character of the horse. *Id.* 204.

9. Where defendant's witness had already testified that he could not remember the bridle that the horse wore on the day of the injury, it was not error for the court to exclude an answer to a question asked witness whether he had furnished a bridle that would be loose on the horse's head. *Id.*

10. Plaintiff sold to defendant Traves a quantity of material for use in the construction of a schoolhouse and upon the

Digitized by Google

EVIDENCE—Continued.

trial offered in evidence delivery slips signed by the defendant, also books of account showing the amount due. Defendant's counsel admitted that the receipts which bore defendant's name were correct and might be received. Proof was made as to plaintiff's method of sale and delivery and the method of keeping track of the same. There was testimony tending to show that regular statements of account were made to Traves without objection and plaintiff's auditor testified to the sending of the statements to defendant. *Held*, that such testimony, with other proof having a tendency to show the claims of plaintiff, was admissible and presented a question for the jury, in a suit on defendant's construction bond to which the contractor and surety were both parties. *People* v. *Traves*, 346.

11. Proof tending to show that the material for building was ordered by the contractor and delivered at the place of construction, with evidence that the contractor gave his notes without objection, for the price, and that monthly statements of account were rendered by the vendor to the buyer, who made no complaint as to their correctness, was evidence of the correctness of plaintiff's claim and that the material was used for contract purposes, in a suit against him and his surety on the construction bond. *Id.*

12. In an action by a terra cotta company for the price of material furnished to a contractor for use in the construction of a school house, wherein the contractor sought to recoup damages because the terra cotta did not comply with the requirements of the contract, where it is conceded that the work as furnished was different from that shown in the architect's original plans, evidence that plaintiff prepared detail and working plans which were submitted to the architect, changed in some particulars, and finally approved by him; that a general custom prevailed to send the architect's plans to terra cotta companies and have them adapt their construction to the architect's design, as shown by his plan; that defendant had knowledge of this custom, and that the parties contracted with reference thereto, was not incompetent as tending to vary the terms of a written contract, but, under proper instructions, was properly admitted for the purpose of presenting to the jury the issue as to plaintiff's performance and defendant's recoupment. *People* v. *Traves*, 415.

13. Where plaintiff furnished to the insurer, a benefit association, verified proofs of death and defendant requested him to forward a copy of the coroner's verdict, which he procured and forwarded, but not as part of the proofs, the contents were not an admission on his part, and were rightly excluded. *Gilchrist* v. *Mystic Workers of the World*, 466.

Digitized by Google

EVIDENCE—Continued.

14. Notwithstanding a written waiver of the statutory privilege contained in a decedent's application for insurance, the opinions and testimony of her attending physicians based on facts learned while they were in attendance as professional advisers was not admissible: the clause contained in the application was void as a waiver under Act No. 234, Pub. Acts 1909, which creates the only exception permitted by law to the general privilege prevailing as to physician and patient, and limits the right of waiver to the heirs-at-law of decedent in a will contest. *Id.*

15. Statements made by decedent, as to the cause of her death, tending to show a breach of certain conditions of the policy, made in the presence of the attending physicians and nurse were not admissible as part of the *res gestæ*, though the admission to the nurse was competent, and should not have been treated as privileged. *Id.* 467.

16. Testimony tending to establish a breach of the benefit certificate, in that insured had submitted to an abortion, was sufficient to require the case to go to the jury, and, if believed, to warrant a verdict for defendant. *Id.*

17. It was error to receive in evidence the files, records and judgment entry of a former judgment in ejectment in the same cause, between the same parties; while it might be competent to show the defendant's omission to claim title by adverse possession at the first trial, as affecting her good faith in afterwards setting up that claim, the prior judgment ought not to have been brought to the notice of the jury; and it was not necessarily final of the issues raised upon the new trial. *Tyler* v. *Wright*, 562.

See APPEAL AND ERROR (1); AUTOMOBILES (1, 2); BOUNDARIES (1); BROKERS; CARRIERS (1); COMPROMISE AND SETTLEMENT (1, 2); CRIMINAL LAW (1); CUSTOMS AND USAGES; DAMAGES (6); DEEDS (2, 4, 9); FRAUD (1, 2, 4); FRAUDULENT CONVEYANCES (1); INSURANCE (2, 3, 6); MASTER AND SERVANT (1, 10, 18, 20, 23, 25); PARENT AND CHILD (1); PARTNERSHIP; PHYSICIANS AND SURGEONS (1); PRINCIPAL AND AGENT (5, 6); RAILROADS (5, 6); SALES (4); SPECIFIC PERFORMANCE (2, 6); TAXATION (4, 10); TRIAL (6, 10, 15, 16); TRUSTS (1, 2); WILLS (1, 2); WORK AND LABOR (4).

EXCEPTIONS—See APPEAL AND ERROR (2).

EXCESSIVE ALIMONY—See DIVORCE (11).

EXCESSIVE DEMAND—See TAXATION (8).

EXCESSIVE VERDICT—See DAMAGES (2, 4, 6, 7).

EXCHANGE OF PROPERTY—See ASSUMPSIT, ACTION OF (2).

EXECUTION SALE—See CONSTITUTIONAL LAW (1).

Digitized by Google

EXECUTORS AND ADMINISTRATORS—See TRUSTS (7).

EXECUTORY CONTRACT—See SALES (5).

EXEMPTIONS—See FRAUDULENT CONVEYANCES (4).

EXPECTANCY—See DAMAGES (7).

EXPERT TESTIMONY—See EVIDENCE (16).

EXPRESS CONTRACT—See WORK AND LABOR (1).

EXTENSION OF TIME—See PRINCIPAL AND SURETY (1).

EXTREME CRUELTY—See DIVORCE (10).

FAILURE OF CONSIDERATION—See ASSUMPSIT, ACTION OF (1).

"FAIR" PREPONDERANCE—See TRIAL (17).

FEDERAL CONSTITUTION—See CONSTITUTIONAL LAW (6).

FEDERAL STATUTE—See MASTER AND SERVANT (21, 22).

FELLOW SERVANT—See MASTER AND SERVANT (4-7, 9, 11, 16).

FENCES—See RAILROADS (1).

FICTITIOUS NAMES—See NAMES.

FIDUCIARY RELATIONS—See EQUITY (5); TRUSTS (7-11).

FIRE INSURANCE—See INSURANCE (4-6).

FORECLOSURE—See APPEAL AND ERROR (3); MORTGAGES (2, 3); TENDER (1, 4); TRUSTS (3).

FOREIGNER—See MASTER AND SERVANT (10).

FORFEITURE—See INSURANCE (4, 5); VENDOR AND PURCHASER (2).

FORGERY—See CARRIERS (10).

FORMER JUDGMENT—See EVIDENCE (17).

FRATERNAL INSURANCE—See INSURANCE (2).

FRAUD.

1. In an action upon promissory notes given in payment of stock in a cement corporation, which defendant claims he was induced to purchase by means of false and fraudulent representations as to the financial condition and property of said company, the articles of association, and the annual reports of the company to the secretary of State were properly admissible in evidence. *Loud* v. *Solomon*, 7.

2. In an action to recover for alleged fraudulent representations in the sale of land, plaintiff is entitled to recover upon

Digitized by Google

FRAUD—Continued.

proof of any material fraudulent representations charged, although he may have charged other acts which were not proven. *Haener* v. *McKenzie*, 27.

3. Representations falsely made by defendant that the land was high and dry and good agricultural land, without mire, swamp, or boggy portions, were material facts and not mere seller's talk, which, relied upon by plaintiff and becoming an inducing cause of the sale, render defendant liable. *Id.* 28.

4. As to whether such representations were made as charged, *held*, to be for the jury. *Id.*

5. An action will lie against defendant for a fraud knowingly committed whether he acted as principal or as agent of another. *Id.*

See COMPROMISE AND SETTLEMENT (4, 5); CONTRACTS (3); DAMAGES (3); EVIDENCE (1, 2, 6); PARTNERSHIP (1, 4); SALES (3); TRIAL (1); TRUSTS (1-3, 5, 7, 10, 11).

FRAUDULENT CONVEYANCES.

1. In proceedings by complainant to set aside an attachment levy on lands sold to them by the judgment debtor, which defendants claimed was made in fraud of creditors, where the fraudulent intent is made a question of fact by the statute (3 Comp. Laws, § 9536, 4 How. Stat. [2d Ed.] § 11420), and the conclusion of the circuit judge that such sale was in fact fraudulent is supported by the evidence, his finding will be affirmed. *McRae* v. *Sleeper*, 168.

2. Complainants' contention that they ought to be protected by the decree to the extent of the consideration actually paid cannot be sustained where the record shows that only part of the lands conveyed is subject to the levy, and the rest is ample security for the consideration actually paid. *Id.*

3. In proceedings to have a deed from defendant wife to her husband decreed to be void and invalid as in fraud of creditors, alleging that said deed was never delivered, evidence of the due execution and delivery of the deed which was not directly refuted, is *held*, sufficient to establish the validity of the deed. *Albert* v. *Patterson*, 378.

4. Where defendant's equity in the property conveyed was less than the homestead exemption, the question of consideration is of no importance. *Id.*

See SALES (2).

FRAUDULENT ISSUE OF STOCK—See RELEASE (2).

FULLY FINANCED—See EVIDENCE (2).

GENERAL REPUTATION—See WILLS (3).

GOOD FAITH—See TRUSTS (3).

Digitized by Google

GRAIN BUSINESS—See CONTRACTS (2).

GRATUITOUS SERVICES—See WORK AND LABOR (3).

HEARSAY—See CRIMINAL LAW (1); EVIDENCE (8); INSURANCE (3).

HOLDING OUT BY PRINCIPAL—See PRINCIPAL AND AGENT (5).

HOMESTEADS—See FRAUDULENT CONVEYANCES (4).

HUSBAND AND WIFE—See EVIDENCE (4); FRAUDULENT CONVEYANCES (3); WILLS (3); WITNESSES (3, 6).

IMPLIED CONTRACT—See EQUITY (6); USE AND OCCUPATION (2).

IMPLIED WARRANTY—See SALES (5); TRIAL (18).

INCOMPETENCY—See WILLS (1).

INDETERMINATE SENTENCE—See CRIMINAL LAW (3, 4).

INDORSEMENT—See CARRIERS (10).

INDUSTRIAL ACCIDENT BOARD—See MASTER AND SERVANT (13).

INFANTS.

Infants, too young to be conscious of the nature of their acts, or danger therefrom, are not chargeable with contributory negligence or with intentional trespass such as to bar recovery for negligent or reckless conduct of others. *Hoover* v. *Railway Co.*, 314.

See AUTOMOBILES (1, 2, 4); CARRIERS (1); NEW TRIAL; RAILROADS (2-6).

INFERENCES—See CRIMINAL LAW (1); NEGLIGENCE (1).

INJUNCTION—See CARRIERS (9); CONTRACTS (4); DEEDS (1, 7, 11); DRAINS; EQUITY (2); MORTGAGES (3); TENDER (1).

INSANITY—See WILLS (2, 3).

INSPECTION—See SALES (4, 6).

INSTRUCTIONS—See CARRIERS (4); DAMAGES (3); MASTER AND SERVANT (2, 4); NEGLIGENCE (1); PHYSICIANS AND SURGEONS (2); PRINCIPAL AND AGENT (4, 7-9); SALES (6); STREET RAILWAYS (2); TRIAL (1, 3, 4, 6, 11, 17).

INSURANCE.

1. Under the provisions of a fire insurance policy on lumber which, without the actual knowledge of the insured, had been mixed with property taken from State lands, by acts of trespass (for which it had settled with the State after date of loss), the moral hazard was not so increased

Digitized by Google

INSURANCE—Continued.

as to avoid the policy on the ground that the insured was not sole and unconditional owner, the value of the lumber owned by plaintiff and covered by the policy being in excess of the insurance. *First National Bank* v. *Insurance Co.*, 251; *First National Bank* v. *Insurance Co.*, 254.

2. In an action upon a fraternal benefit certificate in which a provision appeared for the filing of proofs of death to be passed upon by the board of directors before the beneficiary should be entitled to institute suit, defendant admitted that proofs of death were filed and plaintiff, relying upon the admission, did not offer any evidence as to the proofs which she had presented. Defendant had given no notice of special defense under Circuit Court Rule 7 (*d*) requiring notice of the claim that plaintiff failed to furnish proofs of loss as provided by the policy. *Held*, that the trial court did not err in overruling defendant's motion to instruct a verdict on the ground that sufficient proof of compliance with the conditions of the policy had not been offered. *Gilchrist* v. *Mystic Workers of the World*, 466.

3. Upon the offer of the physician's certificate of death in evidence, an objection that the last sentence in the paper reading "Contributory; abortion said by deceased to have been performed by Dr. ....." was hearsay, and therefore inadmissible, was not well taken except as to the part following "abortion." The words "contributory" and "abortion" were competent evidence; appearing from the context to have been within the knowledge of the physician; and the certificate was admissible. *Id.*

4. Act No. 128, Pub. Acts 1911, limiting the effect of the breach of any condition in a fire insurance policy to instances where the insurer has suffered prejudice from the breach or where the loss took place because thereof, protected plaintiff, who procured additional insurance in violation of the stipulations of his mutual fire policy and he was entitled to recover the loss sustained in the destruction of his farm buildings, although the by-laws of the insurer provided that a member should forfeit his policy if he procured additional insurance in another company, without defendant's written consent. *Lagden* v. *Insurance Co.*, 689.

5. The contention of the defense that, the fire occurring while the violation was in effect, barred plaintiff's recovery, was not sufficient, it appearing from the title of the statute that the purpose was to prevent the forfeiture of policies unless the violation of some condition actually prejudiced the insurer. *Id.*

6. Under the statute the burden was on the insurer to show that it had suffered prejudice therefrom. *Id.*

Digitized by Google

INSURANCE—Continued.

7. *Held*, on rehearing, that defendant could not avail itself of the point, not made in its briefs or on the former argument, that the statute as amended did not affect a policy in force at the time it was enacted. *Id.* 690.

See EVIDENCE (13-16).

INSURANCE PREMIUM—See BILLS AND NOTES.

INTENT—See EQUITY (8); FRAUDULENT CONVEYANCES (1); MUNICIPAL CORPORATIONS (3).

INTEREST—See TENDER (2, 3); TRUSTS (6).

INTERSTATE COMMERCE—See MASTER AND SERVANT (25, 26).

INTOXICATING LIQUORS.

1. Where plaintiff hotel keeper brought suit to recover an amount paid to defendant village under an invalid ordinance, under threat by defendant's officers that the council would not grant his application for a liquor license unless he complied with the terms of said ordinance, his payment of the money without protest is *held* to be a voluntary payment, and without duress. *Baldwin* v. *Village of Chesaning*, 17.

2. Respondent township board was not justified, under Act No. 169, Pub. Acts 1915, in exercising a discretion to reject relator's application and bond for a liquor license, said act having gone into effect subsequent to the filing of relator's application and bond; and it was the duty of said board to act fairly and in good faith, and not captiously, in the approval of bonds, and if the applicant had brought himself within the terms or conditions imposed by the statute, his application should have been granted and his bond approved. *Price* v. *Township Board of Oakfield*, 524.

3. Relator had the right to demand from the township board action on his application and bond under the law as it stood when they were filed; and the captious refusal of respondent to perform its legal duty being unwarranted, mandamus will issue to compel same. *Id.*

INVALID ORDINANCES—See INTOXICATING LIQUORS (1).

IRREGULARITY—See AMENDMENTS.

JUDGMENT—See CONTRACTS (5); CRIMINAL LAW (3); EQUITY (1, 3).

JUDICIAL BONDS—See EQUITY (3).

JURISDICTION—See BOUNDARIES (2); DIVORCE (3, 9); EQUITY (2-4); MASTER AND SERVANT (22); TAXATION (5).

JURY—See CRIMINAL LAW (5, 7); TRIAL (18).

Digitized by Google

JUSTICES OF THE PEACE.

No objection or demurrer to the declaration or to the sufficiency of the common counts having been raised in justice's court, it was not available as a ground for reversal in the circuit or Supreme Court. *Taylor* v. *Belton*, 302.

See ASSUMPSIT, ACTION OF (1); TRIAL (7, 8).

LACHES—See COMPROMISE AND SETTLEMENT (5); TRUSTS (9).

LAND CONTRACT—See ASSIGNMENTS; SPECIFIC PERFORMANCE (2, 4-6); VENDOR AND PURCHASER.

LANDLORD AND TENANT—See USE AND OCCUPATION (1).

LANDS BENEFITED—See DRAINS.

LEASE—See BROKERS,

LIABILITY FOR SUPPORT—See PARENT AND CHILD (2).

LICENSEE—See RAILROADS (2, 7, 10).

LICENSES—See INTOXICATING LIQUORS.

LIFE INSURANCE—See EVIDENCE (13-16); INSURANCE (2, 3).

LIFE TERM—See CRIMINAL LAW (3, 4).

LIMITATION OF ACTIONS—See CONSTITUTIONAL LAW (1); TAXATION (1, 11, 13, 14).

LINE FENCE—See BOUNDARIES (1).

LOCAL SELF GOVERNMENT—See CONSTITUTIONAL LAW (5).

LOCO PARENTIS—See PARENT AND CHILD (2).

LOGS AND LOGGING—See INSURANCE (1).

LOOKOUT—See RAILROADS (3).

MALPRACTICE—See DAMAGES (7); PHYSICIANS AND SURGEONS (1).

MANDAMUS.

Mandamus will not lie to compel a circuit judge to vacate an order unless application for such relief has first been made to him. *Mesler* v. *Circuit Judge*, 195.

See INTOXICATING LIQUORS (3).

MASTER AND SERVANT.

1. In an action by an employee to recover for the loss of an arm in defendant's factory by a machine consisting of a swinging table with a circular saw working through a slit in the back and bottom which was put in operation by a lever, evidence that during the six months plaintiff had used the machine the lever had never failed to work, that

Digitized by Google

MASTER AND SERVANT—Continued.

a few moments before the accident the machine was performing its proper function, that no part of the apparatus had been constructed to support a person falling or slipping on the floor, and that at the time the accident happened plaintiff was not operating the machine, but was returning from carrying away some poles he had cut, when he slipped and fell against the table, disengaging the lever, and was injured, did not show any negligent conduct of defendant, and its motion for a peremptory verdict should have been granted. *Johnston* v. *Cooperage Co.*, 117.

2. The trial court was in error, in submitting the question of defendant's liability to the jury, in limiting the question to the condition of the machine on the day in question and to the strain put upon it by plaintiff when he slipped and fell, as the true rule should be measured by the probability, and not the possibility, of an accident, and should be applicable in like circumstances if the device had been in use a day or a month, where an employee stumbled or fell, and, to save himself, grasped at, or fell against, machinery not up to some standard of efficiency. *Id.* 118.

3. In an action for the death of plaintiff's decedent, who was killed by the falling upon him of an overhanging bank while he was engaged in shoveling earth below, where defendants never assumed the duty of advising the men that it was not safe to work under an overhanging bank or that it was necessary to break down an overhang, and no assurance was given that the apparent condition of the bank was not the real condition, and the danger was too obvious to demand warning or inspection, defendants were not guilty of any negligence entitling plaintiff to recover. *Livingstone* v. *Plate Glass Co.*, 146 Mich. 236. *Robbins* v. *Trebilcock*, 163.

4. In an action for personal injuries caused by a fall of rock on plaintiff in defendant's mine, while plaintiff and another miner were engaged in timbering a passageway, the duty to warn plaintiff of the danger being a delegable one, which duty defendant fully performed when it selected a competent fellow-workman, it was not liable for the fellow servant's negligence, and the court was in error in refusing to charge, as requested by defendant, that plaintiff's co-worker was a fellow servant, and that defendant would not be responsible for his negligence, and instead charged that if the defendant knew of the dangerous condition there, either because of the experience of said co-worker and another in working there before plaintiff came, or had learned it in any other way, or could have learned it by the exercise of reasonable care, and if plaintiff was unaware of the dangerous condition, if it existed, then as the undisputed evidence showed that the shift boss did not warn, it was the duty of the co-worker to do so, and if he failed his failure was the failure of

Digitized by Google

MASTER AND SERVANT—Continued.

defendant and the verdict should be for plaintiff; the court practically directed a verdict for plaintiff. *Aho* v. *Iron Co.*, 218.

5. Evidence tending to establish that plaintiff, an experienced miner in defendant's employ, was injured by a fall of rock from an old stope below which his work was carried on, that the day shift which preceded him was charged with the duty of timbering the roof from which the fall took place, and that they omitted to block up the opening into the old stope, as they should have done, justified the trial court in directing the jury to return a verdict for defendant under the fellow-servant doctrine, since the failure of the men charged with the duty of putting in the sets so as to block up the alleged opening was the work of fellow servants of plaintiff whose duties in the night shift included the work of removing timbers from the drift and replacing them with new timbers. *Kangas* v. *Iron Co.*, 255.

6. The so-called con-association rule, applied in Illinois and other States, that the employees must co-operate in the business in hand in the same line of employment, or that their duties should bring them into habitual association so that they might exercise a mutual influence on each other promotive of caution, etc., in order to make them fellow servants, has not been adopted in Michigan, and, hence, it is not the rule in this State that the employees must be engaged in common employment at the same time. *Id.* 256.

7. Those who serve the same master, work under the same control, derive authority and compensation from the same common source and are engaged in the same general business, though in different grades or departments of it, are fellow servants. *Id.*

8. Defendant mining company was not liable to plaintiff for breach of the nondelegable duty to warn him of the danger from falling rocks, etc., where plaintiff was familiar with the work of retimbering, which it was usual for miners to do, and the men selected to perform the labor were competent and plaintiff was engaged with them in the work of making the place safe. *Id.*

9. In an action for the unlawful killing of a railroad employee, caused by a freight car coming in contact with an ice chute which decedent and his co-servants were charged with the duty of placing far enough from the track so that cars would not strike it, the negligence of decedent was of equal degree with the negligence of his fellow employees, whether he actually assisted in placing the chute, or was merely present and saw the work done, and his estate could not recover for his death. See Act No. 104, Pub. Acts 1909. *English* v. *Railroad Co.*, 286.

10. Evidence that a foreign laborer, 52 years of age, was instructed by the operator of a freight elevator how to run

Digitized by Google

MASTER AND SERVANT—Continued.

it, and how to use the lever and manage the gates or shutters, that he ran the same over 30 days without accident and that in some unexplained manner the elevator started and ascended, injuring him, had no tendency to show insufficient instructions by the employer so as to establish its liability for negligent injuries. *Guido* v. *Stove Works*, 359.

11. Where an employee in defendant's mine, working under the supervision of a timber boss, was injured by the fall of some rock in one of the stopes immediately after a blast, and where it appeared that his work at this time was timbering the mine, replacing some of the timbers which had become displaced, and that the timber boss made an examination of the stope, before plaintiff entered after blasting out a piece of rock, and the boss found the hanging wall apparently safe, but did not call the men in or assure them that the place was safe, that he was accustomed to call the men after he had examined the condition of the rock, if he found everything safe, and that plaintiff knew about the custom and rule, he was not entitled to recover for his injuries. *Vrenelich* v. *Mining Co.*, 407.

12. It is now well settled that the duty to provide a safe place is not applicable to those engaged in the work of timbering: the employer's duty being fulfilled when he has promulgated reasonable rules and properly instructed the servants, furnished suitable tools, machinery and materials for the work and engaged competent men to perform it. *Id.* 408.

13. Until notice of the intention of any employer to take advantage of the workmen's compensation act has been filed with, and accepted by, the Accident Board (Act No. 10, Extra Session 1912), an employer is not brought within its protection; notwithstanding that the servant injured may have made declarations or accepted compensation as fixed by the statute. *Barnard* v. *Traction Co.*, 504.

14. Where plaintiff brought an action for injuries sustained in being run down by defendant's train, and the evidence showed that he, with other section men, was engaged in cleaning off snow from several switches, in the city of Lansing, that plaintiff, in obedience to general instructions, started, after clearing off one switch, to work on another, and, with his cap pulled down over his ears, during a snow storm, ventured on the main track after one train had passed, and failed to look for or observe a train that was following, he was chargeable with the knowledge that the work was of a dangerous nature and he was bound to take reasonable precautions to protect himself from perils arising therefrom, and was guilty of contributory negligence. *Barnhart* v. *Railroad Co.*, 537.

Digitized by Google

MASTER AND SERVANT—Continued.

15. An employee working as a section hand is not entitled to recover for negligence in failing to sound the statutory signals for a crossing. 2 Comp. Laws, § 6292. *Id.*

16. The question of comparative negligence under Act No. 104, Pub. Acts 1909, was not a question of fact for the jury, but was correctly decided by the trial court as a question of law, since the failure of the engineer to discover plaintiff on the track was of lesser degree than plaintiff's want of care. *Id.*

17. The defendant was not chargeable with a violation of the duty to provide a safe place, the track being used for the very purpose for which it was intended, and being rendered unsafe by the act of the employee. *Id.*

18. Nor could he recover for violation of a city ordinance relating to the speed of trains, when it was not introduced in evidence. *Id.*

19. Though one mining corporation owned a majority of the stock and controlled the business and policy of another, for which plaintiff worked, the dominant company was not responsible for injuries sustained by the plaintiff, who was informed by his time check, whenever he had occasion to sign it, who was the real employer, and had notice by the name on his brass pay check that he was employed by the subservient corporation. *Hannula* v. *Iron Co.*, 543.

20. Though letters exchanged between plaintiff's attorney and the attorney for defendant mining company who had authority to advise persons relative to the management of the mine, the correspondence containing his admission that defendant was operating the mine in which plaintiff was employed, later retracted by a second letter which advised plaintiff that another corporation was operating the mine, were admissible as evidence of the ownership and control of the property, the court did not, in rejecting the proofs, prejudice plaintiff, who was not misled, since suit had already been commenced when he received the letters. *Id.*

21. Plaintiff, a freight engineer, in charge of a gravel train, was injured in a collision with defendant's passenger train, which he claimed was running ahead of time and at excessive speed. His own testimony showed that he was operating his train in violation of defendant's rules requiring the engineer to protect the head of his train and to enter a switch or spur with it, at least five minutes ahead of the schedule time of the passenger. He knew the surroundings and the lay of the tracks which contained a reverse curve at the point of impact, shutting off the view ahead. Plaintiff's train was an extra and inferior one, that the rules required him to guard by protecting against the regular passenger train, whose time he knew closely coincided with the time on which he was running.

Digitized by Google

MASTER AND SERVANT—Continued.

Claiming that at 8:03 a. m. somewhat over 700 feet from the switch that he trying to make, the passenger train, due at the switch at 8:05, collided with his freight engine and cars, plaintiff brought action based upon the Federal employers' liability act. (4 U. S. Comp. Stat. 1913, § 8659.) *Held*, that the trial court erred in leaving to the jury the question of contributory negligence, but should have instructed them that plaintiff was guilty of negligence affecting or diminishing his right to damages for the injuries received. *Holmberg* v. *Railway*, 605.

22. It is the duty of State courts to accept jurisdiction and enforce the Federal statute if their jurisdiction as established by local laws is adequate, and as to the requirement affecting the burden of proof, the rule is beyond mere matters of State procedure, and these courts must follow the Federal regulations. *Id.* 606.

23. Assuming that under the congressional enactment the allegation that plaintiff was without fault or negligence as set up in the declaration is surplusage and need not be established, yet if plaintiff's negligence is shown by his own evidence, the defendant may have the benefit, notwithstanding that the *onus probandi* as to contributory negligence may be shifted by the express language of the statute; any presumption of law that plaintiff was not at fault being overthrown by plaintiff's proofs, or the undisputed evidence, his right of recovery must be considered barred, and a verdict ought to be instructed. *Id.*

24. Where the amount of the verdict indicates that the jury did not take into consideration the statutory requirement that plaintiff's negligence be taken into consideration as diminishing the damages recoverable but for his said fault or neglect, the judgment should be set aside on motion for a new trial. *Id.*

25. Testimony that defendant's road extended into a foreign State, that it regularly engaged in interstate traffic and plaintiff's freight train was hauling gravel for use in repairing and improving the roadbed used for these purposes, sufficiently established that plaintiff was engaged in furthering interstate commerce, and brought him within the act.. *Id.*

26. Track repairs and maintenance facilitate and are essential to interstate commerce, and the work of an employee, who is engaged thereon is so directly concerned with and beneficial to all commerce which uses the road, that it must be *held* to bring the servant within the limits of the statute. *Id.*

See CONSTITUTIONAL LAW (6); MUNICIPAL CORPORATIONS (5, 7; RAILROADS (7); TRIAL (4).

MATERIAL FACTS—See FRAUD (3).

Digitized by Google

MATTERS EQUALLY WITHIN KNOWLEDGE OF DECEASED —See WITNESSES (4).

MEASURE OF DAMAGES—See DAMAGES (3, 5); SALES (1).

MERCHANDISE—See SALES (3).

MINES AND MINING—See EQUITY (5); MASTER AND SERVANT (4, 5, 8, 11, 12, 19).

MISAPPROPRIATION OF FUNDS—See RELEASE (1).

MISCONDUCT OF WITNESS—See TRIAL (2).

MISDEMEANORS—See CRIMINAL LAW (2).

MISTAKE—See TAXATION (14); TRUSTS (10).

MODIFICATION OF DECREE—See APPEAL AND ERROR (7).

MONOMANIA—See DEEDS (3).

MORAL HAZARD—See INSURANCE (1).

MORTGAGES.

1. The conveyance of land in consideration of a certain sum of money and an agreement by the vendee to reconvey within three years if the vendor should so elect and tender the money, must be treated as an absolute conveyance of the land with an option to repurchase, and not as a mortgage. *Gogarn* v. *Connors*, 161.

2. In a notice of foreclosure, the date rather than the day stated controls, and in the case of error in naming Friday for Saturday, the ninth, of the month, the notice was not void therefor. *First State Bank of Decatur* v. *Day*, 229.

3. Without some basis in the facts or evidence, the trial court exceeded its authority in providing for a solicitor's fee of $100, by way of punishment for contempt in violating a restraining order of the court; nor was there ground for stopping interest on the amount bid at mortgage sale on foreclosure by advertisement. *Id.*

See APPEAL AND ERROR (3); TENDER; TRUSTS (3).

MOTIONS—See DIVORCE (7); MANDAMUS.

MOVING PICTURE SHOW—See CRIMINAL LAW (2).

MUNICIPAL CORPORATIONS.

1. The provisions of the charter of North Muskegon (sections 3, 13, chap. 6, Act No. 466, Local Acts 1895) authorizing the city to "provide" parks, and to "take, accept and hold" real estate for any purpose connected with parks, are sufficient to authorize the city to purchase land for a public park. *City of North Muskegon* v. *Rodgers*, 93.

2. Under the various local and public acts constituting the charter of the city of Detroit, it was provided that the

Digitized by Google

MUNICIPAL CORPORATIONS—Continued.

board might make disbursements from the county temporary relief fund, as formerly authorized by city aldermen (Act No. 253, Local Acts 1883, sec. 5), and by said act authority was withdrawn from the county superintendents of the poor to administer relief in the city. It was also provided that the board might expend State funds to relieve persons who should become a public charge in a place other than their home, but in no case was it empowered to administer relief outside the city; *held*, that the duties of such board were local in character and that it did not become a State agency in such sense as to exclude the board from the operation of the civil-service amendment to the charter of the city of Detroit, which classifies the city physician as subject to civil service and renders such official removable for cause only. *Pryzbylowski* v. *Board of Commissioners*, 270.

3. The intention indicated by such amendment to the city charter being to affect the local acts that gave the board its authority, by a reasonable construction of the language of the amendment, no ground for excepting them from such operation could be gathered from the titles of the special acts, because it was not thereby expressly declared that they were amendments to the Detroit charter. Id.

4. By charter provisions enacted by the people of the city, adopting a new and comprehensive system of civil service as to all offices, departments and commissions, special acts and legislation in force relating to appointments and removals were repealed or amended, though the later enactment contained no express repealing clause. *Id.*

5. It is provided by Act No. 10, Extra Session 1912, that cities shall be subject to the regulations as to workmen's compensation, and that all acts and parts of acts inconsistent with the statute are repealed. The city of Sault Ste. Marie is governed by and under a charter enacted by the legislature which contains no provision for the payment of claims of such character. In the title to the workmen's compensation law it is indicated that liability of employers for injuries to their employees is included. *Held*, that the title, though general, is sufficient to include municipal corporations if they are employers, and that defendant might lawfully provide funds for the payment of awards. *Purdy* v. *City of Sault Ste. Marie*, 573.

6. *Held*, further, that the title of the statute is sufficient to warrant the repeal of charter regulations in existence at the time the statute went into force. *Id.* 574.

7. Under section 18 of the act containing provisions that want of notice in writing shall not bar the proceeding for an award if the employer had notice in fact, testimony showing that the superintendent of public works knew of the accident within a few days, that he brought the claim to the attention of the board of public works, and

Digitized by Google

MUNICIPAL CORPORATIONS—Continued.

various city officers knew of the accident, sufficiently met the requirements, and, on giving written notice and bringing his claim to the attention of the city within six months, he was entitled to the benefit of the law. *Id.*

See CONSTITUTIONAL LAW (3-6); TAXATION (2).

MUTUAL BENEFIT POLICY—See INSURANCE (4).

NAMES.

1. In an action to recover a claimed balance due for goods sold and delivered, where defendant admitted that he had not complied with the provisions of Act No. 101, Pub. Acts 1907, relative to persons doing business under an assumed or fictitious name, the trial court properly limited defendant's recovery by way of set-off to what was necessary to wipe out plaintiff's claim. *Solomon* v. *Weiner*, 114.

2. Act No. 164, Pub. Acts 1913, cannot be so construed as to impair the right of a promisee in respect to a promise made before its passage, and although complainants had not complied with its provisions requiring such copartnerships to file a verified certificate with the county clerk, they were not barred from enforcing a contract made before the enactment of the statute. *Bottomley* v. *Brown*, 135.

NATURAL WATERCOURSE—See DRAINS

NAVIGATION COMPANIES—See CARRIERS (7).

NEGLIGENCE.

In an action for personal injuries caused by a runaway horse, a charge that negligence may be inferred from the circumstances of the case, that the jury were at liberty to draw the inference of negligence from all the circumstances, if they should find that they warranted such inference, and that the whole question of inference that was to be drawn was a question for the jury, was correct. *Dyer* v. *Ice Co.*, 204.

See AUTOMOBILES; CARRIERS (1, 3, 5); CONSTITUTIONAL LAW (6); DAMAGES (2); EVIDENCE (7); INFANTS; MASTER AND SERVANT; PHYSICIANS AND SURGEONS; RAILROADS (1-4, 6, 7, 9); STREET RAILWAYS; TRIAL (4).

NEWLY DISCOVERED EVIDENCE—See NEW TRIAL.

NEW TRIAL.

Where plaintiff's motion for a new trial, in an action for the negligent killing of a child who wandered onto a railroad track at or about the crossing of an alley, and within the limits of defendant's yard, presented the newly found testimony of a person living near the scene of the accident who saw decedent and another infant slowly

Digitized by Google

NEW TRIAL—Continued.

approaching the tracks and last observed them when they were several feet south of the same, and a minute or less afterwards heard the sound of the train stopping, as bearing on the time within which the engineer might have seen the infants if he had been on the lookout, and where her testimony was merely cumulative, with other proofs offered at the trial on the same point, the court did not err in refusing to grant the application, as the evidence might have been obtained, with the exercise of reasonable diligence, for the first trial; also because the testimony was cumulative and not likely to change the result, which was a judgment and verdict for defendant by direction of the court. *Hoover* v. *Railway Co.*, 313.

See APPEAL AND ERROR (2); MASTER AND SERVANT (24); TRIAL (2, 3).

NON-DELEGABLE DUTIES—See MASTER AND SERVANT (8).

NORTH MUSKEGON CHARTER—See MUNICIPAL CORPORATIONS (1).

NOTICE—See DEEDS (1, 7-9); EQUITY (6); EVIDENCE (8); INSURANCE (2); MASTER AND SERVANT (13, 14); MORTGAGES (2); MUNICIPAL CORPORATIONS (7); PRINCIPAL AND AGENT (9); PRINCIPAL AND SURETY (3, 4).

NOTICE TO REDEEM—See TAXATION (3-5, 7-9).

OBJECTION—See EVIDENCE (5).

OBVIOUS DANGER—See MASTER AND SERVANT (3).

OCCUPATION—See TAXATION (11, 13).

OFFICIAL ACTS—See RELEASE (1); SALES (4).

ONUS PROBANDI—See MASTER AND SERVANT (23).

OPENING STATEMENT—See TRIAL (5).

OPERATION OF TRAINS—See MASTER AND SERVANT (21).

OPTION TO REPURCHASE—See MORTGAGES (1).

ORAL CONTRACT—See CONTRACTS (1); WITNESSES (4).

ORDER OF COURT—See MANDAMUS.

ORDER OF PUBLICATION—See AMENDMENTS.

ORDERS—See CARRIERS (8).

OWNERSHIP OF LAND SOLD—See VENDOR AND PURCHASER (3).

PANEL—See CRIMINAL LAW (5).

Digitized by Google

PARENT AND CHILD.

1. In an action by the natural mother against the estate of an adopting father for the support and maintenance of the adopted child, the action of the trial court in directing a verdict for the defendant is erroneous, as the evidence, considered most favorable to plaintiff, showed that both claimant and decedent expected he would at least contribute to the support of the child. *Greenman* v. *Gillerman's Estate*, 74.

2. A person adopting a child under section 11640, 4 How. Stat. (2d Ed.), stands in the place of a parent to such child and is liable to all the duties and entitled to all the rights of a parent. *Id.*

PARKS—See MUNICIPAL CORPORATIONS (1); TAXATION (2).

PAROL EVIDENCE—See EVIDENCE (6).

PARTNERSHIP.

1. In an equitable action to set aside a written contract of partnership between complainant and defendant, who were mature business men, and had been business associates for many years, where complainant's evidence of fraud and overreaching is met by defendant's evidence, complainant has failed to establish his case by a clear preponderance of positive and convincing evidence which would justify the court in setting aside the contract. *Lavigne* v. *Coyne*, 382.

2. Evidence that complainant was 51 years of age; of varied experience in business enterprises; was an inventor and master mechanic before he reached his majority; was in the manufacturing business for himself for over eight years; had invented and patented over 200 mechanical devices; was at one time president of a motor car company, and at the time of the trial was president of a manufacturing company; was familiar with business methods and with contracts relating to patents as well as legal steps to be taken in obtaining same; objected to the form of the contract and had it changed, saying it was no good because they could not sue any one that infringed; had entered into numerous contracts regarding payment of royalties, and had before been engaged in litigation arising out of contracts concerning his various inventions, was competent to consider in connection with his claim that he was overreached and deceived into signing the contract. *Id.*

3. Complainant's contention that the formation of a manufacturing company was to terminate their contract is inconsistent with the facts, where the evidence shows that although the company was formed four months after signing the agreement, they continued their joint efforts and operations for over five years, defendant furnishing over $2,000 to perfect and patent new inventions, which complainant received and has never offered to refund. *Id.*

Digitized by Google

PARTNERSHIP—Continued.

4. Where complainant repudiates and asks the court to wipe out an instrument in writing, not on its face harsh, unfair, or in any particular questionable, which he signed after examination and change in form as he insisted, on the ground that he was inveigled into signing it by fraud and falsehood, the burden of proof is upon him, and where the evidence is not clear, convincing, and free from doubt, the decree of the court below dismissing the bill will be affirmed. *Id.* 383.

PART PERFORMANCE—See CONTRACTS (1).

PAUPERS—See MUNICIPAL CORPORATIONS (2).

PERMANENT ALIMONY—See DIVORCE (2).

PERSONAL DECREE—See DIVORCE (5).

PERSONAL INJURIES—See AUTOMOBILES (1, 4); CARRIERS (1, 5, 7); CONSTITUTIONAL LAW (6); DAMAGES (1, 4); EVIDENCE (7); MASTER AND SERVANT (1, 4, 5, 10-12, 14, 19); NEGLIGENCE; PHYSICIANS AND SURGEONS; RAILROADS; STREET RAILWAYS.

PERSONAL PROPERTY—See SALES (2).

PHYSICIAN AND PATIENT—See EVIDENCE (14).

PHYSICIANS AND SURGEONS.

1. Where plaintiff, after sustaining a fracture of his left arm, employed defendant to reduce it, and after wearing the splints two weeks found, as he claimed, a bunch on the inner side of the arm, caused by defendant's failure to properly treat it and where there was evidence of a medical expert that the splints used by defendant were too short, the court did not err in submitting to the jury the question of fact as to malpractice, though defendant disputed the claim of plaintiff. *Wilk* v. *Black*, 478.

2. And where defendant's counsel, at the trial, made no complaint that the court had omitted any instructions to the jury, and there was testimony tending to show want of sufficient skill, the charge submitting to the jury the question of negligence in possessing or exercising reasonable skill was not open to objection, on error. *Id.*

See DAMAGES (7).

PLEADING—See AUTOMOBILES (3); BOUNDARIES (3); CONTRACTS (4); DIVORCE (3); FRAUD (2); MASTER AND SERVANT (23); SPECIFIC PERFORMANCE (1); TRUSTS (1, 4); USE AND OCCUPATION (3).

POSSESSION—See SPECIFIC PERFORMANCE (4); TAXATION (13).

POWERS OF CITIES—See MUNICIPAL CORPORATIONS (5, 6).

PRACTICE—See CONTRACTS (5); DIVORCE (7); MANDAMUS; TRIAL (12).

Digitized by Google

PREJUDICE—See CRIMINAL LAW (6, 7).

PREJUDICIAL ARGUMENT—See TRIAL (9).

PRESUMPTIONS—See AUTOMOBILES (4); DEEDS (2); EVIDENCE (11); RAILROADS (2); TAXATION (10); TRUSTS (2); WORK AND LABOR (3, 4).

PRINCIPAL AND AGENT.

1. In an action for goods sold and delivered, where the bargain was made, and the goods received, during defendant's absence, by an agent who had authority to buy *some* goods, the question whether the agent was acting within his authority was for the jury. *Acorn Refining Co.* v. *Knowlson*, 123.

2. Where the agent informed defendant that the goods were consigned upon special agreement, but the order signed was unconditional, and the agent, with defendant's consent, paid out defendant's money for apparatus the agent claimed plaintiff was to furnish, the question whether defendant ratified his agent's action was for the jury. *Id.*

3. A party dealing with an agent is bound to inquire into the extent of his authority, ignorance of which is no excuse, but, having ascertained the general character or scope of the agency, he is authorized to rely upon the agent's having such powers as naturally and properly belong to such character, and, in the absence of circumstances putting him upon inquiry, is not bound to inquire for secret qualifications or limitations of the apparent powers of the agent. *Id.*

4. Instructions to the jury so confusing and misleading as to leave in doubt the rule to be applied in determining the agent's authority to bind defendant, *held* to be erroneous. *Id.* 214.

5. Where there is no testimony that plaintiff or its salesman had any knowledge concerning the apparent authority of defendant's agent beyond the agent's own action and statements, and the salesman did not ascertain or inquire about the general character or scope of the agency, but acted upon the assumption that because he was willing to do business he had authority to do it, plaintiff was in no position to rely upon any holding out of the agent by defendant, since one is not affected by facts of which he has no knowledge. *Id.*

6. However, it was proper for plaintiff to prove the scope of the agent's authority, and to show that it extended far enough to authorize him to purchase a line of goods not before carried by defendant. *Id.*

7. Where the agent was not left in full charge of the business it was erroneous for the court to allow the jury to speculate upon the question whether the particular goods, a new line, "would be handled by that kind of a concern,"

Digitized by Google

PRINCIPAL AND AGENT—Continued.

"whether it was a kindred business" such as defendant would expect an agent to take on, and whether "he would have authority to use his best judgment" in taking it on, in the face of undisputed testimony stating the limits of the agent's general authority. *Id.*

8. Where defendant's agent informed him that the sale was conditional, and plaintiff claimed that it was absolute, knowledge of correspondence between the parties in which the respective claims were made, and failure to immediately repudiate the transaction would not amount to ratification, as defendant might be excused for assuming that the dispute would be settled agreeably with the agent's contention. *Id.*

9. Instructions by the court that notice to the agent was notice to the principal, and that the correspondence, being carried on by express authority of defendant, would be such notice as to amount to ratification if he received the benefits of an unauthorized agreement, was erroneous, as defendant might have been willing to ratify a conditional sale but not an unconditional one. *Id.*

10. A principal is not chargeable with constructive notice of unauthorized acts of his agent. *Id.* 125.

See FRAUD (5); TRIAL (1); TRUSTS (8).

PRINCIPAL AND SURETY.

1. The acceptance by the vendor of the notes of said contractor, which the former discounted to obtain credit or funds, did not release the surety unless it suffered prejudice by the extension: nor did payment of interest or the addition thereof to the renewal notes operate as a release, where the surety was paid for its services and suffered no injury by the action. *People* v. *Traves*, 346.

2. The rule of *strictissimi juris* does not usually apply to the undertakings of a surety company, acting for a compensation; but if a material variance in the contract is disclosed, the surety may be held discharged. *Id.* 347.

3. Although Act No. 187, Pub. Acts 1905, § 2, requires the subcontractor to give notice in writing to the board or officers that he relies upon the security of the bond of the principal contractor before payment is made, whereupon he shall acquire the benefit of the security given by the principal contractor, it is *held*, in an action by a subcontractor against the surety on a statutory bond for the construction of a school house, that notice served on the school board after part of the material had been paid for, but while there was still due to the principal contractor on the general contract more than was owing to the subcontractor, was a sufficient compliance with the act. *People* v. *Traves*, 415.

Digitized by Google

PRINCIPAL AND SURETY—Continued.

4. Defendant company, being surety for profit, could not benefit by plaintiff subcontractor's failure to give timely notice under Act No. 187, Pub. Acts 1905, § 2, where said surety has neither alleged nor proved any actual injury to it from such failure. *People* v. *Bowen*, 187 Mich. 257. *Id.*

See COMPROMISE AND SETTLEMENT (1).

PRIOR YEARS—See TAXATION (4).

PRIVILEGE—See EVIDENCE (15).

PRIVILEGED COMMUNICATIONS—See EVIDENCE (4, 5, 14); WITNESSES (3, 6).

PROBATE JUDGES—See EVIDENCE (4); WITNESSES (3).

PROCEEDINGS IN JUSTICE'S COURT—See TRIAL (7).

PROOF—See FRAUD (2, 4); PRINCIPAL AND AGENT (6).

PROOFS OF DEATH—See EVIDENCE (13); INSURANCE (2).

PROPERTY INTERESTS—See DIVORCE (1, 3, 5).

PROXIMATE CAUSE—See CARRIERS (3); DAMAGES (1).

PUBLIC POLICY—See CONTRACTS (3); SALES (2).

QUIETING TITLE—See BOUNDARIES (1, 2); TAXATION (5).

RAILROAD COMMISSION—See CARRIERS (7-9).

RAILROADS.

1. In this State the rule is well settled that railroads are not required to fence their yard limits, nor is failure so to do evidence of negligence. *Hoover* v. *Railway Co.*, 313.

2. It will not be presumed, from an implied license to cross a railroad track at an alley, that helpless infants, too young to understand danger, will be suffered by those that are responsible for them to wander along or upon the railroad right of way upon which numerous trains are accustomed to pass. *Id.* 314.

3. Where there is reason to anticipate that persons or children may be met with on the tracks, especially in cities or towns, trains cannot be operated on the assumption that the track will be clear, and need not be watched, but a proper lookout must be maintained with that degree of care which a person of ordinary caution, having in mind both the safety of the train with its passengers and persons ahead likely to be injured by it, would commonly exercise under like circumstances, according to the probability of danger at the portion of the track being traversed. *Id.*

Digitized by Google

RAILROADS—Continued.

4. Those who have no relations with infants, such as parent and child, teacher and pupil, or master and apprentice, from which special duties or obligations arise, are not liable for acts done in carrying on the business in which they may be engaged beyond the liability that would attach to negligence towards other classes of persons, not guilty of contributory negligence. *Id.*

5. Where two infants were struck by defendant's passenger train, in a city where an alley crossed the right of way, and the evidence showed that no person was in sight when the engine turned the nearest curve to the place of the accident, and the engineer testified that he was watching ahead, and that he made every effort to stop when he did discover them, about 150 or 200 feet ahead of the train, which was running 18 or 20 miles an hour, and it appeared that it could not be checked by using the emergency brake in less than 300 feet or upwards, that the defendant had often warned trespassers off its right of way at this point, had at one time fenced it, being within the yards, and had not acquiesced in the use of the tracks by the public, the trial court did not err in directing a verdict for the defendant railroad. *Id.*

6. And upon proofs tending to show that the infants went upon the track not over 200 feet in advance of the train, too near for it to be stopped without hitting them, that the engineer could not have stopped his train in time even if he had seen them sooner, evidence of actionable or culpable negligence was insufficient to charge defendant with liability for the death of one of the children. *Id.* 315.

7. Decedent was an employee of the defendant railroad company. He was accustomed in going to his work to travel along the right of way of defendant, a route which the public was accustomed to follow. Other servants of the company likewise made use of the tracks as a path to and from its shops. A freight train of the railroad company passing at this point about 5 o'clock in the morning, when it was dark and foggy, with the engine backing at the forward end, the tender in front, and having no light displayed, ran down decedent, who was not seen by any of defendant's employees and who was fatally injured. *Held*, on rehearing, that in operating trains over a part of the right of way which was used by employees as a foot-path, defendant was under no legal obligation to display lights and to sound the statutory signals for a crossing. *Risbridger* v. *Railroad Co.*, 672.

8. *Held*, that the additional fact, not adverted to in the first, or original, holding in this case, that plaintiff's intestate was inside the cattle guard situated at the crossing and was within the yard limit of defendant railroad company, furnished further reason for denying any right of recovery to the estate. *Id.*

Digitized by Google

RAILROADS—Continued.

9. It being impracticable to prevent trespassing upon railroad tracks enclosed by a cattle guard, a trespasser takes the risk of any resulting injury; the company owes no more strict duty than not to wilfully or wantonly kill or injure him. *Id.*

10. And even if decedent should be considered a licensee upon the right of way, he had no ground or right to expect that the corporation would forego its reasonable and ordinary use of the tracks. *Id.*

See CARRIERS (1, 3, 7); DAMAGES (2); MASTER AND SERVANT (9, 14-16, 21, 22, 25, 26); NEW TRIAL; TAXATION (11, 14).

RAPE—See TRIAL (9, 10).

RATIFICATION—See COMPROMISE AND SETTLEMENT (4); PRINCIPAL AND AGENT (2, 8, 9).

REASONS FOR DIRECTING VERDICT—See TRIAL (12).

RECONVEYANCE—See TAXATION (3).

RECORDING DEED—See CONSTITUTIONAL LAW (2).

RECORDS—See EVIDENCE (3); WITNESSES (3).

REDEMPTION—See VENDOR AND PURCHASER (2).

RE-EXAMINATION—See WITNESSES (1).

RELEASE.

1. Where there was dissatisfaction with defendant's management of the affairs of a corporation of which he was secretary, treasurer, and manager, and a tripartite agreement was signed by the parties in interest settling their affairs and releasing defendant, who was withdrawing from the business, from all claims of every nature against him on account of any official acts, misappropriation of funds which he had paid to himself as salary in addition to his fixed salary, not disclosed to complainant at the time the release was signed, although an examination of the books would have disclosed it, was not an official act included in the release. *School of Applied Art* v. *Buckley*, 178.

2. But the fraudulent issue of corporate stock by defendant, who appropriated the proceeds to his own use, was an official act from the liability for which the agreement released him. *Id.*

See COMPROMISE AND SETTLEMENT (4).

RELEASE OF SURETY—See PRINCIPAL AND SURETY (1).

REMEDIES—See EQUITY (5); VENDOR AND PURCHASER (3).

REPAIRS AND IMPROVEMENTS—See MASTER AND SERVANT (25).

Digitized by Google

REPEAL—See MUNICIPAL CORPORATIONS (4, 5).

REPUTATION—See TRIAL (11); WILLS (2, 3).

RESCISSION—See ASSUMPSIT, ACTION OF (1); DAMAGES (3).

RESERVATION OF TITLE—See SALES (2, 3).

RES GESTÆ—See EVIDENCE (15).

RESIDENCE PURPOSES—See DEEDS (7).

RES JUDICATA—See EVIDENCE (17); TRIAL (16).

RESTITUTION—See COMPROMISE AND SETTLEMENT (5).

RESTRAINING INVASION OF PROPERTY—See EQUITY (2).

RESTRAINT OF TRADE—See CONTRACTS (3).

RESTRICTIONS—See DEEDS (5-10).

RETROACTIVE EFFECT—See STATUTES.

RETURN OF CONSIDERATION—See BILLS AND NOTES.

REVIEW—See JUSTICES OF THE PEACE.

RIGHT OF ACTION—See ASSIGNMENTS.

RIGHT OF WAY—See RAILROADS (1).

RIOTS—See CRIMINAL LAW (2).

RULES—See MASTER AND SERVANT (21).

SAFE PLACE—See MASTER AND SERVANT (3, 11, 12, 17).

SALES.

1. Where plaintiff sold defendant scrap iron at a fixed price per ton and defendant objected to receiving certain castings because they were too heavy to handle, whereupon plaintiff instructed him to return them if he did not want them at the contract price, but instead of doing so he kept them and later sold them, the measure of damages was the contract price, and the trial court was in error in instructing the jury that defendant should account for them at what they were reasonably worth. *Solomon* v. *Weiner*, 114.

2. A contract of sale containing a clause that "title to, property in, and right of possession to said goods, and to all other goods ordered by said second party of said first party within one year from the date hereof, shall be and remain in said first party until sold, and that upon sale thereof, the proceeds received therefor, whether notes, accounts or moneys, shall be and remain the property" of the seller until the goods were paid for in cash, was not void as to creditors of the vendee, or as to his trustee in insolvency,

Digitized by Google

SALES—Continued.

upon grounds of public policy. *Mishawaka Woolen Manfg. Co.* v. *Stanton*, 237.

3. An order for goods containing a reservation of title to the merchandise sold by a clause in fine print at the bottom of the agreement, which the purchaser signed, was not invalid because his attention had not been called to the clause by the agent who took the order, where no artifices or deception was used to secure his signature, and such provision was printed in the same type as the rest of the contract in the body of the order above the buyer's signature. *Id.* 238.

4. In an action for the conversion of a quantity of pork which defendant claimed had soured or spoiled and consequently deteriorated in value, evidence that the municipal inspector had inspected it three days after the delivery and condemned a portion was inadmissible, though the court properly allowed testimony to be received that it smelled bad and was in poor condition. *Baker* v. *Kamantowsky*, 569.

5. In an executory contract for the sale of personal property, the implied warranty of quality or fitness does not survive acceptance of the goods, and it is the duty of the purchaser to inspect and reject, or pay the contract price. *Stearns Salt, etc., Co.* v. *Lumber Co.*, 700.

6. In an action for the balance due on two cars of lumber, which plaintiff sold to defendant without an express warranty, where the defendant acted promptly in inspecting the lumber and tendered payment for the part accepted, and notified plaintiff that the rest was rejected, the court was not in error in instructing the jury that the contract was severable and defendant had the right to accept such as conformed to the warranty and reject the rest. *Id.*

See ASSUMPSIT, ACTION OF; CONTRACTS (1); DAMAGES (5); EVIDENCE (10); PRINCIPAL AND AGENT (1, 8); TRIAL (19).

SAULT STE. MARIE CHARTER—See MUNICIPAL CORPORATIONS (5).

SAVING QUESTIONS FOR REVIEW—See APPEAL AND ERROR (6).

SCHOOLS AND SCHOOL DISTRICTS—See PRINCIPAL AND SURETY (3).

SECRET LIMITATION OF AGENT'S POWERS—See PRINCIPAL AND AGENT (3).

SECTION MEN—See MASTER AND SERVANT (14).

SELLER'S TALK—See FRAUD (3).

SERVICE OF NOTICE ON HEIRS—See TAXATION (5).

Digitized by Google

SERVICES OF RELATIVE—See WORK AND LABOR (2, 3).

SET-OFF AND RECOUPMENT—See EVIDENCE (12); NAMES (1); WITNESSES (5).

SEVERABLE CONTRACT—See SALES (6).

SHERIFF'S DEED—See CONSTITUTIONAL LAW (1, 2); EQUITY (1).

SIGNALS—See MASTER AND SERVANT (15).

SOLICITOR'S FEE—See MORTGAGES (3).

SPECIAL DEFENSES—See INSURANCE (2).

SPECIAL QUESTIONS—See TRIAL (15).

SPECIFIC PERFORMANCE.

1. Under a bill of complaint charging that a deed from decedent to his daughter was invalid because of the grantor's mental incompetency, evidence that an agreement was made between the daughter and complainants after the father's decease that if she would release her rights in and to the father's estate they would deliver possession of the farm to her, but that she refused later to carry out the agreement, did not justify granting the relief of specific performance, in the absence of a prayer for such relief in complainants' bill, especially when they did not come into court on that theory, and only demanded the specific enforcement of the arrangement if they failed to establish their claim. *Case* v. *Bogart*, 297.

2. In an action for specific performance of a land contract, evidence by complainant, that, on a certain date within the time limited in the contract, she, in presence of defendants, counted out the money to defendants' attorney, and requested him to make out the necessary papers; that he offered the money to defendants and explained to them what it was for and complainant's purpose in tendering it to them; that they refused to accept it, and repudiated the contract on the ground that they had been offered more money for the property, corroborated by defendants' attorney and another witness who was present when the offer was made, is sufficient to establish the fact that tender was timely made, and complainant not in default in any respect, notwithstanding defendants' denial of the offer. *Brin* v. *Michalski*, 400.

3. A decree for specific performance of a land contract will be affirmed, even though complainant has an adequate remedy at law for damages. *Id.*

4. It is no objection to the validity of a land contract that a stipulation as to possession is omitted from its provisions, as the law provides that possession remains with the vendor until full performance and receipt of deed by the vendee. *Id.*

Digitized by Google

SPECIFIC PERFORMANCE—Continued.

5. While provisions as to defeasance, insurance, repairs, and payment of taxes might properly have been included, they are not essential to the validity, or decree for specific performance, of a land contract, where said agreement is definite as to parties, property, consideration, terms, and time of performance. *Id.*

6. Where the evidence shows that it is within the power of defendants to perform, a decree for specific performance of a land contract will be affirmed, although they do not hold legal title to the property. *Id.* 401.

See EQUITY (5, 7, 8).

SPECULATION BY JURY—See PRINCIPAL AND AGENT (7).

STALE CLAIM—See WORK AND LABOR (4).

STATE—See TAXATION (10).

STATE AGENCY—See MUNICIPAL CORPORATIONS (2).

STATE COURTS—See MASTER AND SERVANT (22).

STATE HOMESTEAD LANDS—See TAXATION (12).

STATE LAND COMMISSIONER—See TAXATION (12).

STATE LEGISLATURE—See CONSTITUTIONAL LAW (5).

STATEMENT OF FACT—See EVIDENCE (7).

STATE TAX DEED—See VENDOR AND PURCHASER (1).

STATUTE OF LIMITATIONS—See LIMITATION OF ACTIONS.

STATUTES.

Legislation is to have prospective operation only, except when the contrary intent is clearly expressed. *Price* v. *Township Board of Oakfield*, 524.

See AMENDMENTS; CONSTITUTIONAL LAW (3, 4); CRIMINAL LAW (3); DIVORCE (4); INSURANCE (5); INTOXICATING LIQUORS (2); MUNICIPAL CORPORATIONS (3, 4, 6); NAMES; TAXATION (1); TRIAL (13); USE AND OCCUPATION (1); WITNESSES (3).

STATUTORY BONDS—See COMPROMISE AND SETTLEMENT (1); PRINCIPAL AND SURETY (3).

STOCK AND STOCKHOLDERS—See CORPORATIONS; EVIDENCE (1).

STREET RAILWAYS.

1. In an action against a street railway company for personal injuries to plaintiff, caused by defendant's street car colliding with a wagon in which plaintiff was riding, *held*, the evidence presented by plaintiff raised an issue for the jury. *Pearl* v. *Railway*, 84.

Digitized by Google

STREET RAILWAYS—Continued.

2. An instruction by the court that it was the duty of the motorman operating the approaching car, when the plaintiff was crossing in full view, to operate the car so as to avoid a collision with him, if possible, and if he did not do so, but collided with and injured plaintiff, then the defendant was guilty of negligence, was erroneous, as it held him to a higher degree of care than the law demands, and was misleading. *Id.*

STRICTISSIMI JURIS—See PRINCIPAL AND SURETY (2, 4).

STRIKING OUT TESTIMONY—See COMPROMISE AND SETTLEMENT (2).

SUBROGATION—See APPEAL AND ERROR (7).

SUNDAY THEATRES—See CRIMINAL LAW (2).

SUPPORT AND MAINTENANCE—See PARENT AND CHILD (1).

SURETY COMPANY—See PRINCIPAL AND SURETY (2, 4).

SURPLUSAGE—See MASTER AND SERVANT (23).

TAXATION.

1. In an action of ejectment to recover possession of land purchased by tax deeds, one dated February 10, 1897, for the taxes of 1893, and the other May 3, 1898, for the taxes of 1894, the court was in error in directing a verdict for defendant on the ground that the provisions of section 115, Act No. 153, Pub. Acts 1885, limiting the right of action to five years after the execution of the tax deed, controlled; the section relied upon having been repealed by Act No. 206, Pub. Acts 1893. *Wolverine Land Co.* v. *Jerome*, 66.

2. Where a city is authorized to buy land for park purposes, and there is nothing in its charter forbidding its purchasing property at a tax sale, and the evidence showed the purchase of property by complainant city at a tax sale for park purposes, that the sale was reported to the court and duly confirmed, that the State authorities recognized the validity of the sale and issued a deed, that notice was duly served upon defendant, who took no steps to redeem, that there is no claim on the part of defendant that the taxes were paid or the property exempt, and that more than five years had elapsed after confirmation before filing the bill, the sale will be *held* valid, and the cloud removed from complainant's title. *City of North Muskegon* v. *Rodgers*, 93.

3. Where the tax title owner made out a *prima facie* case by introducing proof of the service of a notice to redeem, and the defendants met the same by evidence that the owner had died several days before the notice was shown to have been served, the defendant had fully rebutted the case

Digitized by Google

TAXATION—Continued.

of complainant who was not entitled to equitable relief. *Bretz* v. *Hitchcock*, 492.

4. Some proof must be presented as to the amounts of taxes for other years paid as a condition of the tax purchase, and included in the notices served, which are not *prima facie* proof of the said amounts or years. The burden of proof is on the complainant to show a valid title and service of a proper notice. *Id.*

5. Service of notice to redeem on the heirs of a deceased made, as to one, the day after complainant filed his bill, and as to the other only a few days before commencement of suit, so that the return of service was not filed until after suit was begun, was not sufficient to confer jurisdiction to quiet title. *Id.*

6. The owner of the record title, who permits his lands to be sold for taxes, is not entitled to an accounting for timber removed by the purchaser of the tax title interest until he redeems, since the holder of the record title has only a bare right to reconveyance. *Id.*

7. Where complainant acquired title to land, which was assessed as one parcel, by the tax deed of 1892, and, in order to acquire such title, was required to pay taxes subsequently assessed on the premises as two parcels, it was unnecessary, in the notice to redeem, to state the separate amounts assessed to each parcel, as defendant would have to pay the total amount to redeem either parcel. *Rogers* v. *Davison*, 519.

8. Complainant's demand, in the notice served on defendant, for $10.00, as for two descriptions, was excessive, where the statute allows $5.00 for each description; but the notice was not thereby invalidated, as the "amount paid" in taxes, required by the statute, was correctly given. *Id.*

9. Where the patentee of land sold part of the premises, reserving a roadway connecting the two parcels, and later sold the other parcel, the title to both becoming merged in one owner, the easement was extinguished, and the notice to redeem from a tax sale was not defective because not served upon the patentee. *Id.* 520.

10. A deed from the State land commissioner, conveying to plaintiffs certain real property as tax homestead lands under section 127 of the tax law and under Act No. 211, Pub. Acts 1905 (1 How. Stat. [2d Ed.] §§ 1898, 2021), being in the usual form and reciting facts sufficient to show compliance with the statute, made a *prima facie* case of title in the grantee of the State who purchased the homestead property pursuant to law. *Darrow* v. *Railway Co.*, 664.

11. After six months from the date of recording the conveyance from the auditor to the State, its recitals of the finding and determination of the auditor general and State

Digitized by Google

TAXATION—Continued.

land commissioner that lands deeded to the State under section 127 of the tax law as tax homestead lands were unoccupied and abandoned lands became conclusive, notwithstanding that the examiner's report in the records of the land office showed that the lands were occupied: Act No. 84, Pub. Acts 1903, fixing a limit after which the validity of such deeds to the State may not be questioned. See 1 How. Stat. (2d Ed.) § 2060. *Id.*

12. Containing recitals of facts sufficient to warrant the State officials in classifying such lands as State homestead lands, the conveyance was not open to attack as not fair on its face. The finding of the auditor general and land commissioner that the land was unoccupied or abandoned was not void because conflicting with the report of the examiner, since their finding is not necessarily based on the conclusion of the latter officer. *Id.* 665.

13. The fact of possession or occupancy by the owner did not operate to take the case out of the statute of limitations, and was not a reason for holding the provisions of law inapplicable on constitutional grounds. The owner had lost his rights by permitting the lands to be returned and sold for taxes, and was not entitled to hold possession. *Id.*

14. Though the premises affected by the action of ejectment were in part occupied and used by defendant for station grounds, the deed issued to the State by the auditor general was fair upon its face, was recorded, and the statute of limitations (Act No. 84, Pub. Acts 1903) began to run; and the defense that the auditor's deed to the State was based upon a finding contrary to the report of the examiner, and contrary to the facts, or was the result of a mistake, is not available after the six-month period fixed by the statute has expired. *Id.*

See DRAINS; VENDOR AND PURCHASER (1).

TAX DEEDS—See TAXATION (1, 2).

TAX HOMESTEAD LANDS—See TAXATION (10).

TENDER.

1. An injunction against foreclosing a mortgage held by the mortgagee, a savings bank, was properly refused in a suit brought to restrain it from foreclosure by advertisement, and a decree was correctly granted in favor of the mortgagee in proceedings brought to foreclose the instrument by the holder, to whom the defendants had tendered a sum insufficient to pay the principal and interest, all of which the bank had declared to be due and payable for defendant's default under the terms of the security; the two causes being consolidated and heard as one. *First State Bank of Decatur* v. *Day*, 228.

2. Where the tender was made as indicated by the parties to pay all that was due under such mortgages and defendant's

Digitized by Google

TENDER—Continued.

indebtedness included a note for interest that he had allowed to accrue, and which remained unpaid, the tender should have included the sum due for such interest, although the bank had indorsed upon the mortgage notes, as paid, the sum represented by the note. *Id.*

3. The objection that the bill of complaint did not rely upon any claim that the principal had become due, was untenable where the complainant had elected to declare the entire debt due and payable; the mortgagee was entitled to declare the principal due, if it had been in arrears for a sufficient length of time, the mortgage so providing by express language, and if the tender was not large enough to satisfy the sum due. *Id.*

4. No estoppel could be said to have arisen from a letter of the holder of the mortgage to the second mortgagee, one of the joint defendants, containing the advice or suggestion that the second mortgagee pay the prior lien, neither party having changed his situation because of the position taken in the letter by the senior incumbrancer. *Id.* 229.

See SPECIFIC PERFORMANCE (2).

TERMINATION OF CONTRACT—See PARTNERSHIP (3).

TIMBERING MINES—See MASTER AND SERVANT (5, 11).

TITLE—See TAXATION (10).

TORT ACTIONS—See CARRIERS (4); USE AND OCCUPATION (3).

TOWNSHIP BOARDS—See INTOXICATING LIQUORS (2, 3).

TRACK MAINTENANCE—See MASTER AND SERVANT (25).

TRESPASS—See EQUITY (2); INFANTS; INSURANCE (1); RAILROADS (1, 7-9); USE AND OCCUPATION (3).

TRIAL.

1. Where the court charged the jury that it was undisputed that plaintiff's agent made substantially the same representations to defendant that plaintiff made, and the agent testified that he attempted to sell stock to defendant, at plaintiff's request, that he received his information concerning the financial condition of the company from plaintiff, and that he made the representations claimed by defendant, and plaintiff admitted that the agent assisted in the sale of the stock, while it is doubtful whether the instruction was warranted, yet, in view of the entire charge, and the almost conclusive evidence in support of these facts, it cannot be said that the jury were misled. *Loud* v. *Solomon*, 8.

2. Although it was highly improper for plaintiff's witness to engage in a heated discussion about the case with a witness for defendant in the corridors of the courthouse,

Digitized by Google

TRIAL—Continued.

during a recess, the action of the judge, who investigated the incident at the time, in overruling a motion for a new trial, will not be reversed, where it does not appear that any juror heard what was said. *John S. Noel Co.* v. *Newcomb*, 54.

3. Argument of plaintiff's counsel, invited by argument of opposing counsel, while not to be commended, where the trial judge in his charge to the jury endeavored to correct it, and the amount of the verdict was not excessive, is not sufficient cause for reversal. *Rogers* v. *Ford*, 62.

4. Where there was no evidence from which the jury could determine that the force applied by plaintiff in falling against the table was a greater strain than the device would receive in the ordinary conduct of the business, it was error for the trial court to submit that question to the jury. *Johnston* v. *Cooperage Co.*, 118.

5. Although plaintiff's counsel, in his opening statement, used language that was ambiguous and somewhat at variance with the declaration, it was erroneous for the trial court to direct a verdict for defendant, where part of the opening statement was conformable to the declaration, and there was testimony tending to support it. *Kimmerle* v. *Bonine*, 148.

6. Where the substance of requests to charge was given in almost the exact language of the requests, no error was committed in refusing to charge as requested. *Dyer* v. *Ice Co.*, 203.

7. In an action for wages by a farm hand, cross-examination of defendant as to proceedings in the justice's court is largely a matter of discretion with the trial court, where defendant stated he had not been allowed by plaintiff's counsel to take the stand and refute testimony given by plaintiff; but where he afterwards admitted that neither court nor counsel prevented his taking the stand, it was error for the court to allow the justice to testify to the same matter, which did not go to prove or disprove any issue on trial, but only tended to divert the attention of the jury to an immaterial issue, and confuse it with the real question, which was the agreement as to plaintiff's employment, and what, if anything, was yet due to him upon it. *Salmer* v. *Hicks*, 391.

8. While there was no direct testimony as to the result in justice's court, the prominence given the proceedings in that court indirectly indicated who appealed and why, and this, in connection with an expression of personal views by the court as to the statutory right of appeal, which tended to shadow the defense with a prejudicial inference, militated against the exercise of an unbiased judgment, and resulted in prejudicial error. *Id.*

Digitized by Google

TRIAL—Continued.

9. In an action for assault with intent to commit rape, it was error for plaintiff's counsel, in his closing argument, in response to remarks of defendant's counsel that plaintiff, who had previously been seduced by another man, had already received the greatest injury any woman could suffer, and had settled for $400, to reply that neither the jurors nor any parent would feel that their daughter was less entitled to damages by reason of being overpersuaded by a young man to whom she was engaged, and that the position taken by counsel for defendant was unjust and contrary to the natural feeling of parent and child. *Mortensen* v. *Bradshaw*, 436.

10. In an action for assault with intent to commit rape, it was improper for plaintiff's counsel, in argument, while discussing the question of damages, to refer in detail to the possessions of defendant. *Id.*

11. Where there was no evidence showing loss of reputation and standing in the community as a result of the alleged assault, it was erroneous for the trial judge to permit the jury to award damages therefor. *Id.* 437.

12. Reasons for the direction of a verdict should be stated by the trial court. *Parsille* v. *Brown*, 485.

13. The direction of a verdict constitutes a charge within the purview of the statute. 3 Comp. Laws, § 10247 (Act No. 101, Pub. Acts 1885). *Id.*

14. An assignment of error that the court erred in taking the case from the jury may properly be construed to mean that the testimony presented a question of fact and that the court erred in directing a verdict for the appellee. *Id.*

15. Special questions in ejectment so framed that, taken singly or as a whole, they call for findings that may be conclusive of the principal issue, should be submitted to the jury, if proper in form and in substance. *Tyler* v. *Wright*, 561.

16. Plaintiff brought ejectment for a parcel of land that defendant claimed by adverse possession of her predecessor in title. In a suit brought by plaintiff's grantor prior to the ejectment proceedings, the court had adjudged a deed invalid that had been deposited in escrow with her father, defendant's said predecessor, by his wife to his daughter, the court holding that the proof of a sufficient delivery was incomplete. It was again offered in evidence for the sole purpose of showing the attitude of the father, who received it in escrow. *Held*, that the former judgment, while conclusive of the validity of the instrument, did not bar proof of the mental attitude of the father in relation to any possible claim of title. *Id.*

17. In an action of ejectment instructions that the burden was on defendant to convince the jury by a "fair" preponderance of the evidence that the adverse holder had occupied

Digitized by Google

TRIAL—Continued.

the premises long enough to acquire title, while objectionable, because the court employed the word "fair," were not so prejudicial as to require reversal of the judgment for that cause. *Id.* 562.

18. Counsel's statement, in the course of arguing the cause to the jury, in an action for the conversion of certain meat, that in the sale of an article of food, a warranty was implied by the law that the article was fit for the purpose for which it was sold, was inapplicable, and where the court so advised the jury, the appellant was not prejudiced by the ruling, on the ground that he should have been permitted to state his theory to the jury, the rule of law having no proper application to the issues unless it related to defendant's contention that he had purchased the pork of a wholesale dealer in meat, in which event the rule of *caveat emptor* would apply as the testimony was undisputed that he was not a consumer but a retail dealer, and had an opportunity to inspect. *Baker* v. *Kamantowsky*, 569.

19. Upon the sale of food by one dealer to another with full opportunity to make an inspection, the law does not imply a warranty of fitness or quality. *Id.*

See APPEAL AND ERROR (4); COMPROMISE AND SETTLEMENT (1, 3); EVIDENCE (9); MASTER AND SERVANT (2, 24); PRINCIPAL AND AGENT (7, 8); STREET RAILWAYS (2); WITNESSES (1, 2).

TRUSTS.

1. Evidence claimed by complainant to prove fraudulent conduct between decedent and defendant trust company to enable the latter to evade trust obligations and take in its name property of complainant in its hands in trust under an oral arrangement, *held*, to be insufficient to support the averments of fraudulent conduct as to either defendant or the deceased. *Weir* v. *Trust Co.*, 452.

2. Fraud is not to be lightly presumed, but there must be substantial evidence to establish it. *Id.*

3. *Held*, also, that the price obtained for the property mortgaged was not so excessively low as to indicate fraud or collusion, and that the holder and purchaser bought in good faith for an adequate consideration. *Id.*

4. Where decedent appeared from the testimony to have interested himself in the affairs of complainant from disinterested motives and at her instance and desire, to help her save a valuable equity in heavily incumbered property, and had no expectation of compensation or reward for his services, and the relation between complainant and decedent was friendly in his lifetime and he would not have claimed or withheld any part of the amount finally realized by the sale of the property, the trial court

Digitized by Google

TRUSTS—Continued.

was justified in finding that the excess of proceeds above costs, expenses, etc., realized by a sale of the incumbered realty by the trust company which had bid it in, should be impressed with a constructive trust in her favor under an agreement between decedent and defendant trust company that it should make advances needed to bid in the property in its name, and to hold the property for decedent. *Id.*

5. Fraud is not necessary to give rise to a constructive trust, but if circumstances are such as to render it inequitable for the holder of the legal title to retain the same, the court may charge it with a trust in favor of the equitable owner. Implied trusts arise by operation of law as contradistinguished from those that arise from agreements of the parties, and are raised by law for the purpose of carrying out the presumed intent of the parties, or without regard to such intention for the purpose of asserting equitable rights or frustrating fraud. This form of trust is practically unlimited in extent and is employed whenever, in the opinion of the court, it becomes necessary to prevent a failure of justice. *Id.* 453.

6. It is further *held* that the trustee under such implied trust should be charged with such interest on the sums in its hands as they may have earned during the time it held said money or proceeds. *Id.*

7. The principal defendant was the administrator *de bonis non* of the will of Polly Robinson, deceased, and his son was one of the heirs and devisees under said testament, of a remainder in testator's farm, subject to a life interest in one of her daughters. Defendant, who was an uncle of complainants and fully trusted by them, administered the estate for many years. The son became subject to ill health and went to a warmer climate, during which time his father advanced to him considerable sums of money. Approaching complainants for the purpose of procuring a release or quitclaim of their interest in the real property mentioned, in his son's favor, defendant falsely represented the nature and effect of the conveyance, in that he stated it was only intended to vest in the son an interest which he would finally have anyway and told the grantors that they would have no interest in the property ultimately. These representations were untrue, and complainants were induced by them and by other misleading representations to sign the paper, which later proved to be a quitclaim deed of their remainder interest. The son died before the life tenant. Defendant administrator survived his son and the life tenant, having procured a deed from the son conveying the realty to himself, and he finally disposed of the premises for $4,500 more than the inventory value. He converted the proceeds to his own use. Complainants claimed the right to an accounting and to follow the funds derived from these

Digitized by Google

TRUSTS—Continued.

transactions as a trust fund. *Held*, that the court of equity would compel defendant administrator to account for the property as for a portion of a trust estate, that the relations between himself and complainants were of a fiduciary nature, and that he was chargeable with the proceeds of the sale for the benefit of complainants. *Parks* v. *Brooks*, 645.

8. One occupying a position of trust and confidence may not place himself in a situation in which his interest may conflict with his duty. *Id.*

9. As the defense of laches rests primarily on the theory that it would be unjust to permit a claim to be enforced by reason of changed conditions or altered situation of the parties resulting from delay, mere lapse of time unaccompanied by any elements of estoppel will not deprive a complaining beneficiary of his remedy against his trustee. *Id.* 646.

10. As a general rule a mistake of law is no ground for equitable relief, but if the mistake has been induced by false representations of a party, standing in a relation of trust and confidence towards the injured one, the court of equity may interfere to remedy the injustice; or if it appear that a fiduciary perceived or knew of the mistaken view so held, and took advantage of the fact, the court will be more inclined to interpose its remedial powers. *Id.*

11. And equity will require an accounting, if fraud is charged and proved or if fiduciary relations exist. *Id.*

12. Chancery courts not only have a general supervisory authority over trustees and strictly trust estates, but have power to correct breaches of trust and fraudulent conduct on the part of all persons that may occupy relations of confidence; and it is not essential that the accounts be mutual or complicated or that the bill be framed for a discovery; nor is the objection that complainant has an adequate remedy at law tenable as a defense to the proceeding. *Id.*

UNAUTHORIZED ACTS—See PRINCIPAL AND AGENT (10).

UNDUE INFLUENCE—See APPEAL AND ERROR (4); DEEDS (2, 3).

UNOCCUPIED AND ABANDONED LANDS—See TAXATION (11, 12).

USE AND OCCUPATION.

1. In an action for use and occupation against the grantee of a trustee in bankruptcy, where the trustee and his grantee refused to recognize plaintiff's title, claiming fraud in the conveyance to plaintiff by the bankrupt, also refusing to recognize an oral lease of the premises by plaintiff to the bankrupt, and also claiming hostile possession of the trus-

Digitized by Google

USE AND OCCUPATION—Continued.

tee by reason of the amendment to the bankruptcy act of June 25, 1910 (30 U. S. Stat. chap. 541, § 47, 36 U. S. Stat. chap. 412, § 8), providing that the trustees, as to all the property coming into the custody of the bankruptcy court, shall be deemed vested with all the rights and remedies of a lien creditor, and as to all other property, not in the custody of the bankruptcy court, with all the rights and remedies of a judgment creditor holding an execution duly returned unsatisfied, no contract relations existed between plaintiff and defendant from which the relation of landlord and tenant could be implied, and that, notwithstanding a decision in an equity suit to set aside the conveyance sustaining its bona fides in favor of plaintiff as defendant. *Smith* v. *Haight*, 512.

2. An action for use and occupation, being founded on contract, express or implied, will not lie where the occupancy is adverse, the owner's title being in dispute; and a trespasser cannot be made liable for rent, as upon an implied contract to pay, by the landlord's notifying him that he would be expected, if he stayed, to pay rent. *Id.* 513.

3. Where plaintiff's declaration was based upon the common counts, no attempt being made to waive the tort as provided in the statute (section 11207, 3 Comp. Laws), he cannot recover under his pleading; his remedy being an action of trespass or tort. *Id.*

VALUE OF STOCK—See EVIDENCE (1).

VARIANCE—See TRIAL (5).

VENDOR AND PURCHASER.

1. The vendee in a land contract was justified in paying the taxes which it was the duty of the vendor to pay, where the same appeared to be a lien upon the land, although the tax sale and deed issued to him thereunder were void. *Cornell* v. *Norton*, 187.

2. Complainant purchased 160 acres on a land contract, agreeing to pay therefor $400 in annual instalments of $100 each, with interest. Defendant agreed to convey the land by warranty deed subject to all taxes assessed for and after 1895. The contract provided that on failure of the vendee to perform, the vendor might elect to be discharged from his covenants and forfeit the payments and all improvements made. Complainant made valuable improvements, but failed to pay any part of the purchase price. He acquired a tax deed from the State for the taxes of 1894, which it was defendant's duty to pay, and claimed to own the premises thereunder on advice of eminent counsel, although said deed is now admitted to be void. Defendant, after waiting for 11 years, declared the contract forfeited and brought ejectment, and complainant seeks to restrain the suit at law and to be allowed

Digitized by Google

VENDOR AND PURCHASER—Continued.

to redeem from the forfeiture. *Held*, that the decree of the court below allowing the complainant to redeem by paying the purchase price, with interest, together with the taxable costs of the ejectment suit and costs of this suit, less the amount of the taxes of 1894, with interest, should be modified to include an allowance of $50 beyond the taxable costs in the ejectment suit. *Id.*

3. A land contract would be equally valid if the vendor had no title to the property nor ability to secure one, though, if the latter were shown, the only remedy would be an action for damages. *Brin* v. *Michalski*, 401.

See SPECIFIC PERFORMANCE (2, 4).

VENUE—See CRIMINAL LAW (5, 7).

VERBAL ACTS—See CRIMINAL LAW (1).

VICIOUS CHARACTER—See EVIDENCE (8).

VIOLATION OF ORDINANCE—See MASTER AND SERVANT (18).

VOID POLICY—See INSURANCE (1).

WAIVER—See EVIDENCE (5, 14).

WARNING AND INSTRUCTING SERVANT—See MASTER AND SERVANT (4, 8, 10, 15).

WARRANTY—See EVIDENCE (6); SALES (5, 6); TRIAL (19).

"WATERED STOCK"—See CORPORATIONS; EVIDENCE (1).

WATERS AND WATER COURSES—See DRAINS.

WEALTH OF DEFENDANT—See TRIAL (10).

WEIGHT OF EVIDENCE—See APPEAL AND ERROR (2); CARRIERS (5); DAMAGES (7).

"WHACK"—See EQUITY (8).

WILLS.

1. Evidence that the testator, whose will was offered for probate, suffered financial reverses, became moody, ceased to attend church and lost his affection for his family, accused his wife of extravagance and left his family without bidding them good-bye, later charging the wife with adultery without grounds therefor, and remaining away from them until his death, that he became possessed with the belief that some of his children were illegitimate and cursed them when they were referred to, *held*, to warrant the determination of the jury that he was mentally incompetent. *In re Thayer's Estate*, 261.

2. The trial court committed no error in admitting testimony that the wife's reputation for chastity was good, in a will

Digitized by Google

WILLS—Continued.

contest wherein the contention was made that testator had an insane delusion or belief that she was guilty of infidelity. *Id.* 262.

3. In corroboration of the wife's denial that she had been unfaithful, the question what her reputation was in the community was not erroneous on the ground that her general reputation was in question. *Id.*

See APPEAL AND ERROR (4); WITNESSES (6).

WITNESSES.

1. After a witness has been examined, he may be subjected to further interrogation by the party by whom he is called; the extent of such re-examination resting largely within the discretion of the trial court. *Loud* v. *Solomon*, 7.

2. Where, while plaintiff was upon the witness stand, at the close of a redirect examination, and before recross-examination began, the court asked that each counsel finish with the witness, and no further questions were asked by plaintiff's counsel, and, after a short recross-examination, plaintiff's counsel asked the privilege of asking a few more questions, the refusal of such request was not an abuse of discretion by the court. *Id.*

3. In a prosecution for using an instrument with intent to produce a miscarriage, where the court, upon request of the prosecutor, entered orders for the probate judge and clerk to produce the records and testify to the marriage of respondent and deceased, celebrated by said judge in conformity with Act No. 180, Pub. Acts 1897, as amended by Act No. 232, Pub. Acts 1899, which provide that all knowledge of any facts coming to the judge or his deputies shall be privileged communications, and that such records shall be open to inspection only upon written order of the circuit judge, such orders did not authorize either officer to state communications and facts received in confidence and privileged by the law. *People* v. *Atwood*, 36.

4. The trial court was not in error in excluding testimony of defendant as to a subsequent oral agreement with the president of plaintiff, since deceased, modifying the original contract, although the agreement was made in Illinois; the law of this State would govern. 5 How. Stat. (2d Ed.) § 12856. *Rockford Malleable Iron Works* v. *Tilden*, 80.

5. Where defendant sought to recoup damages for breach of contract, and plaintiff contended it was unable to fulfill because the proper materials were not furnished by defendant, and defendant claimed that they were the same he had furnished others, and that no complaint had ever been made, cross-examination of defendant as to his contention did not exceed the discretion lodged in the trial judge. *Id.*

6. Notwithstanding the privilege created by section 10213, 3 Comp. Laws (5 How Stat. [2d Ed.] § 12857), providing

Digitized by Google

WITNESSES—Continued.

that neither husband nor wife shall, after marriage, be examined as to any communication made by one to the other during the continuance of the marital relation, the widow, in a contest concerning her husband's will, might properly be asked if the testator, who was claimed to have been laboring under an insane delusion that his wife was unfaithful, had ever accused her of infidelity. *In re Thayer's Estate*, 262.

WORDS AND PHRASES—See EQUITY (8).

WORK AND LABOR.

1. If the facts and circumstances attending the performance and acceptance of services rendered show an expectation of receiving compensation by the party rendering the service, and expectation to pay on the part of the one receiving them, a legal liability for the value of the services performed is created, and an express contract is not essential. *Vandecar* v. *Nowland's Estate*, 429.

2. In an action against an estate for services rendered deceased by his son-in-law, evidence that decedent told claimant and his wife to go on a farm owned by him and work it, and what they made was theirs, and the place would be for them, and that deceased at different times made assurances that the farm should be, or was, theirs, was insufficient to establish contractual relations between claimant and deceased, and said statements amounted only to declaration of testamentary intent, not binding on deceased or his estate. *Id.*

3. Evidence examined, and *held*, that claimant has not, under the circumstances of this case, overcome the presumption that such services, rendered by a relative, are gratuitous. *Id.* 430.

4. Where the items composing the claim extended through a period of nearly 30 years, and all were over six years old, and no demand for compensation was ever made during the lifetime of deceased, thus affording a presumption that none was contemplated by either party, particularly strong and convincing proof is required before leaving it to a jury. *Id.*

WORKMEN'S COMPENSATION LAW—See CONSTITUTIONAL LAW (3); MASTER AND SERVANT (13); MUNICIPAL CORPORATIONS (5).

WRITTEN CONTRACT—See EVIDENCE (12).

WRITTEN NOTICE—See MUNICIPAL CORPORATIONS (7).

YARD LIMITS—See RAILROADS (1, 8, 9).

Digitized by Google

Digitized by Google

Digitized by Google

Digitized by Google

Digitized by Google